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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 282

ATLANTIC AND GULF STEVEDORES, INC.,
PETITIONER,

vs.

ELLERMAN LINES, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1961
CERTIORARI GRANTED OCTOBER 16, 1961

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APPELLANTS' APPENDIX.

RELEVANT DOCKET ENTRIES.

Dec. 7, 1955.	Complaint filed.
Dec. 7, 1955.	Summons exit.
Dec. 7, 1955.	Plaintiff's demand for jury trial filed.
Dec. 19, 1955.	Plaintiff's interrogatories to defendants filed.
Dec. 23, 1955.	Summons returned "on 12/16/55 served" and filed.
Feb. 24, 1956.	Appearance of Krusen, Evans & Shaw, Esqs., for defendants, filed.
Feb. 27, 1956.	Stipulation and Order extending time for filing. Answer filed. Noted 2/28/56.
Feb. 28, 1956.	Answer filed.
Mar. 1, 1956.	Order to place case on trial list filed.
Apr. 30, 1956.	Defendant's Answers to Plaintiff's Interrogatories filed.
July 5, 1956.	Defendants' Interrogatories to Plaintiff filed.
July 11, 1956.	Motion to bring in 3rd-party and Order Approving same, filed, noted, 7-12-56.
July 11, 1956.	Third party complaint filed.
July 11, 1956.	Third party summons exit.
July 19, 1956.	Plaintiff's answers to interrogatories, filed.
July 19, 1956.	Plaintiff's supplemental interrogatories to defendant, filed.

Aug. 13, 1956.	Third party summons returned "on August 2nd, 1956 served" and filed.
Aug. 15, 1956.	Answer of third-party defendant filed.
Aug. 23, 1956.	Defendants' Motion for further answers by plaintiff to interrogatories and for Protective Order, and Order to place on argument list filed.
Sept. 24, 1956.	Additional answers to defendant's interrogatories by plaintiff filed.
Dec. 13, 1956.	Defendant's answers to plaintiff's supplemental interrogatories, filed.
Apr. 14, 1958.	Jury and alternates called and sworn.
Apr. 14, 1958.	Trial—witness sworn.
Apr. 15, 1958.	Trial resumed.
Apr. 16, 1958.	Trial resumed.
Apr. 17, 1958.	Trial resumed.
Apr. 18, 1958.	Trial resumed.
Apr. 21, 1958.	Trial resumed.
Apr. 23, 1958.	Trial resumed.
Apr. 24, 1958.	Trial resumed.
Apr. 25, 1958.	Trial resumed.
Apr. 28, 1958.	Trial resumed.
Apr. 28, 1958.	Verdict: The jury returns a special verdict by answering interrogatories (see minutes). Eo Die: The Court directs the entry of judgment.
Apr. 28, 1958.	Judgment in favor of plaintiff and against defendants in the sum of $100,000.00, and in favor of Third-party defendant and against Third-party plaintiffs, filed. 4/29/58 noted & notice mailed.

Apr. 29, 1958.	Plaintiff's requests for points of charge, filed.
Apr. 29, 1958.	Defendant's points for charge, filed.
Apr. 29, 1958.	Interrogatories suggested by plaintiff to the jury, filed.
Apr. 29, 1958.	Interrogatories suggested by defendants to the jury, filed.
Apr. 29, 1958.	Third-party defendant's motion to dismiss and motion for a directed verdict, filed.
May 6, 1958.	Deposition of Donald Quinn, filed.
May 7, 1958.	Defendant's motion for judgment notwithstanding the verdict or for a new trial, filed.
May 7, 1958.	Third-party defendant's bill of costs, filed.
May 13, 1958.	Order of Court directing Marshal to furnish jurors and 2 Deputy Marshals with supper filed.
Oct. 15, 1958.	Plaintiff's bill of costs, filed.
Mar. 20, 1959.	Transcript of hearing of Apr. 14 thru 28, 1958, filed. (7 vols.)
Apr. 24, 1959.	Order of Court directing Clerk to release temporarily to Krusen, Evans & Shaw, Esq exhibit P-19, filed. 4-27-59 noted.
June 24, 1959.	Argued sur deft's motion for judgment n.o.v. or for a new trial. CAV.
Apr. 4, 1960.	Order of Court denying Defendants' motions to set aside judgment and for judgment in their favor and for a new trial, filed. 4-5-60 Noted & Notice Mailed.

May 3, 1960. Notice of appeal by defendants, filed. Copies to Freedman, Landy & Lorry, Esq. and Davis, Marshall & Crumlish, Esq.

May 3, 1960. Copy of Clerk's notice to U. S. Court of Appeals, filed.

May 3, 1960. Affidavit of Thomas E. Byrne, Jr., Esq. re service of motion for new trial, etc., filed.

July 7, 1960. Defendants' Supersedeas Bond in $120,000.00 with the Aetna Casualty & Surety Co., surety, and Order approving same filed. 7/8/60 noted & notice mailed.

COMPLAINT.

Jury Trial Demanded.

Plaintiff, Leighton Beard, claims of the defendants the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, upon a cause of action whereof the following is a true statement:

1. Plaintiff is a citizen and resident of the Commonwealth of Pennsylvania.

2. Defendants are corporations organized and existing under and by virtue of the laws of Great Britain.

3. Plaintiff avers, upon information and belief, that at all times mentioned herein defendants owned, operated, managed, possessed and controlled the S. S. "City of Calcutta" in foreign commerce.

4. Plaintiff, on or about the 1st day of July, 1955, and at all times mentioned herein, was an employee of Atlantic and Gulf Stevedores, Inc., of Philadelphia, Pennsylvania, in the capacity of longshoreman.

5. On or about the 1st day of July, 1955, and at all times mentioned herein, Atlantic and Gulf Stevedores, Inc., was employed in discharging cargo from the holds of the S. S. "City of Calcutta" by virtue of authority from and an understanding entered into with the said vessel's owners, charterers, operators and duly authorized representatives, including the defendants herein.

6. On or about the 1st day of July, 1955, at or about 4:30 P. M., plaintiff, in the course of his employment, engaged in the performance of his duties in connection with the discharge of cargo from the S. S. "City of Calcutta,"

while the said S. S. "City of Calcutta" was in navigable waters of the United States and moored at Pier 98, South Wharves, in the harbor of Philadelphia, Pennsylvania, was working in the No. 1 hold of the vessel assisting to discharge bales of burlap when the steel bands of one of the heavy bales being raised out of the hold broke, causing the said bale to fall down into the hold and strike the plaintiff, knocking him violently against the steel bulkhead of the hold and rolling upon and crushing his right leg, as a result of which he sustained the injuries which are more specifically set forth hereinafter.

7. Disregarding their duties in the premises, defendants, by their agents, servants, workmen and employees, were careless and negligent and the vessel unseaworthy in:

(a) failing to provide plaintiff with a reasonably safe place in which to work;

(b) furnishing cargo handling equipment of a kind and nature which was unsafe to use under the circumstances;

(c) requiring cargo to be discharged which was in an unsafe, defective and dangerous condition under the circumstances;

(d) permitting cargo to be discharged in a manner which was dangerous and unsafe under the circumstances;

(e) permitting cargo to be stowed in the hold in an unsafe condition;

(f) failing to adopt and follow a safe system of stowage under the circumstances;

(g) permitting cargo assigned to other ports to block, obstruct and interfere with the safe and proper discharge of cargo under the circumstances;

(h) failing to make a proper and adequate inspection of the cargo to determine the existence of any unsafe and dangerous conditions;

(i) failing to issue proper and adequate warning of the unsafe and defective condition of the cargo and the manner in which it was bound and secured;

(j) failing to provide plaintiff with a safe and seaworthy vessel, with safe and seaworthy appliances and appurtenances, and in failing to maintain the same in a safe and a seaworthy manner.

8. By reason of the negligence of the defendants and the unseaworthiness of the vessel as set forth above, plaintiff sustained severe injuries to his head, face, neck, chest, body, back, spine, arms and legs; he suffered a severe shock and brain concussion; he suffered a severe wounding of the muscles, ligaments, nerves, tendons and tissues of the right chest and lung; he suffered a severe injury to the right femur and to the muscles, tendons, ligaments, nerves and tissues of the right thigh; he has suffered a severe injury to the bones, cartilages, muscles, ligaments, tendons, nerves and tissues of the back and spine; he was required to submit to various and numerous operative procedures to the right thigh and leg; various complications at the fracture site and adjoining area of the right femur required the amputation of the right leg and a revision amputation of the right knee; he has suffered internal injuries of a known and unknown nature; he suffered a severe shock to his nervous system; he has suffered agonizing aches, pains, mental anguish and disability, and, upon information and belief, he will suffer severe pains, aches, mental anguish and disability in the future; he has been unable to assume his usual occupation, duties and activities in the past, and he will be permanently and totally impaired from performing his usual duties and occupation and from engaging in his usual and normal pursuits and activities in the future; he has been

compelled to incur obligations for medical and hospital care in the past and will be compelled to expend and incur obligations for medical care and attention in the future, all to his loss and damage.

WHEREFORE, plaintiff, Leighton Beard, claims of the defendants the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, with lawful interest thereon, and brings this action to recover same.

FREEDMAN, LANDY AND LORRY,

By MILTON M. BOROWSKY,

Attorneys for Plaintiff.

ANSWER OF DEFENDANTS TO COMPLAINT.

The Answer of the Defendants, Ellerman Lines, Ltd., and The City Line, Ltd., respectfully alleges upon information and belief as follows:

The defendants admit the averments of paragraphs 1, 2 and 4 of the Complaint. The Defendant, Ellerman Lines, Ltd., admits so much of the third paragraph of the Complaint as avers that it owns the Steamship "City of Calcutta." It denies the remaining averments of the third paragraph of the Complaint. The Defendant, The City Line, Ltd., denies the averments of the third paragraph of the Complaint.

The defendants deny that they have knowledge or information sufficient to form a belief as to the averments of the fifth paragraph of the Complaint except that they admit that on or about July 1, 1955 Atlantic and Gulf Stevedores, Inc., were engaged in discharging cargo from the S.S. "City of Calcutta."

The defendants deny all and singular the averments of paragraphs 6, 7 and 8 of the Complaint.

Second Defense.

The plaintiff was guilty of contributory negligence.

Third Defense.

The plaintiff assumed the risks.

Wherefore, the defendants pray that the Complaint herein shall be dismissed, that it shall recover its costs in this proceeding and that it shall have such other and further relief as may seem just to this Honorable Court in the premises.

Kruesen, Evans & Shaw

By /s/ T. E. Byrne, Jr.,
Attorneys for Defendants.

THIRD PARTY COMPLAINT.

The Third Party Complaint of Ellerman Lines, Ltd. and The City Line, Ltd. against Atlantic & Gulf Stevedores, Inc. (Pa.), respectfully alleges upon information and belief as follows:

1. The plaintiff herein has filed a Complaint against the defendants, a true and correct copy of which is attached hereto and made a part hereof.

2. The defendants have filed an Answer to the Complaint of the plaintiff, a true and correct copy of which is attached hereto and made a part hereof.

3. The plaintiff, Leighton Beard, at all times referred to in the Complaint, was an employee of the Third Party Defendant, Atlantic & Gulf Stevedores, Inc. (Pa.)

4. On or about October 1, 1952 the Third Party Defendant entered into a written contract with Ellerman and Bucknall Steamship Company, Ltd., which was, by its terms, to apply to the stevedoring work on all vessels owned, managed, chartered or otherwise controlled by Ellerman and Bucknall Steamship Company, Ltd. On or about July 1, 1955 the Steamship "City of Calcutta", owned by Ellerman Lines, Ltd., was controlled by Ellerman and Bucknall Steamship Company, Ltd., and the work being performed on board the S.S. "City of Calcutta" in July 1, 1955 was being performed by the Third Party Defendant pursuant to the terms of the aforesaid contract, excepting only those terms setting forth the rates to be charged and in this respect, the contract of October 1, 1952 had been the subject of a novation between the parties, all other terms, however, remaining in full force and effect.

5. If the defendants or either of them should be held liable to the plaintiff, which liability they both herein expressly deny, then the third party defendant is liable over to the defendants or either of them by reason of the following:

(a) Third party defendant failed to properly perform the work of unloading the S.S. "City of Calcutta";

(b) Third party defendant was negligent in the manner in which it undertook to unload cargo from the S.S. "City of Calcutta";

(c) Third party defendant so performed the work of unloading the Steamship "City of Calcutta" so as to cause injury to one of its employees, the plaintiff herein;

(d) Third party defendant supplied and used devices in connection with unloading the Steamship "City of Calcutta" which were dangerous, improper and, in addition, violated the terms of its agreement heretofore referred to.

WHEREFORE, the defendants aver that if the plaintiff shall recover any sum against them or either of them by reason of the matters alleged in his Complaint, that the defendant or defendants, as the case may be, are entitled to recover indemnity from the third party defendant.

KRUSEN, EVANS & SHAW

By /s/ T. E. BYRNE, JR.,
Attorneys for Defendants,
Ellerman Lines, Ltd.
and The City Line, Ltd.

ANSWER.

Atlantic & Gulf Stevedores, Inc., Third Party Defendant herein, files this, its Answer to defendant's Complaint as follows:

First Defense.

Atlantic & Gulf Stevedores, Inc., Third Party Defendant herein, admits the allegation contained in Paragraphs One, Two and Three of the Third Party Complaint, admits that said work was being performed between the parties pursuant to a contract in writing dated October 1, 1952 and avers that said contract, by its complete terms, speaks for itself, specifically denies the allegations contained in Paragraph Five (a), (b), (c), (d), and on the contrary, avers that said Third Party Defendant performed its work and duties in a safe workmanlike and proper manner in accordance with the agreement aforesaid and further in accordance with the standard and procedures used in the nature of the work being performed.

Second Defense.

Third Party Defendant herein avers that it was the employer of plaintiff at the time of the instance referred to and as such third party defendant's sole obligation and responsibility in the premises are limited to the benefits to which plaintiff is entitled under the Longshoremen's and Harbor Workers' Relief Act.

Third Defense.

Atlantic & Gulf Stevedores, Inc., third party defendant herein specifically denies any acts of negligence or carelessness in the performance of the duties at the time pertinent herein and further specifically denies any obligation to

defendant and third party plaintiff herein by way of indemnity or in any way whatsoever.

WHEREFORE, Third Party Defendant, Atlantic & Gulf Stevedores, Inc., prays that the Petition against Third Party Defendant herein and the relief demanded therein be denied and dismissed as to third party defendant.

DAVIS, MARSHALL & CRUMLISH,

By F. E. MARSHALL,
Francis E. Marshall,
Attorneys for Atlantic & Gulf Stevedores, Inc.

EXCERPTS FROM TESTIMONY.

(12) Mr. Borowsky: If the Court please, at this time I should like to introduce the admissions in the pleadings. The defendant Ellerman Lines, Limited, and City Line, Limited.

The Court: Go ahead; maybe we can agree on certain things.

Mr. Borowsky: The defendant admits that the plaintiff is a citizen and resident of the Commonwealth of Pennsylvania. They admit that the defendants are corporations organized and existing under and by virtue of the laws of Great Britain.

Ellerman Lines, Limited, admits it owns the ss "City of Calcutta."

It is admitted also that the plaintiff on or about the first day of July, 1965, and at all times mentioned herein was an employee of the Atlantic & Gulf Stevedores, Inc., Philadelphia, Pennsylvania, in the capacity of longshoreman.

The defendants also admit that on or about July 1, 1965, Atlantic & Gulf Stevedores, Inc., were engaged in discharging cargo from the ss "City of Calcutta."

That is the extent of the admissions in the pleadings.

• • •

(13) JAMES P. CRAFT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Borowsky:

Q. Mr. Craft, what is your occupation?

A. Longshoreman.

• • •

Q. Were you employed on July 1, 1955?
A. I was.
Q. By Whom?
A. Atlantic & Gulf Stevedores Company.

• • •

(14) Q. What kind of vessel was the "City of Calcutta"?
A. That was a cargo vessel.
Q. And where was it on that particular day?
A. It was docked at Pier 98.

• • •

Q. Were you working in any particular hatch aboard that vessel?
A. In No. 1 hatch.

• • •

Q. Is that the one that is closest to the bow end of the vessel?
(15) A. That is the one that is closest to the bow, the first hatch.
Q. Will you please tell us, if you know, how many decks are in that particular hatch.
A. Well, it is about three decks and one lower hold. What they call a lower hold is the first deck down in there underneath the lower tweendeck.

• • •

(17) Q. Had you worked aboard the vessel, that particular vessel, the day before?
A. No, we didn't.
Q. What time of the day, if you recall, did you begin to work?
A. Well, we checked in—it was around about 1:30 we got started to work.
Q. Would that be 1:30 in the afternoon?
A. In the afternoon.
Q. What did you do after you went aboard the ship and started to work at No. 1 hatch?

A. Well, four of us takes off the tarpaulins, and the other four would be rigging up the hatch.

* * *

(19) Q. Now, on this particular day after you uncovered the hatch opening on the top deck what if anything did you do to the hatch openings in the deck below the top deck, if you remember?

A. We had to remove the beams. I don't remember any hatches being on. I think they had to take the beams off all the way down to the lower tweendeck before we could start to work.

Q. What if anything was down in that lower tweendeck?

A. Well, bales of burlap.

Q. Will you describe for us, please, where these bales of burlap were with respect to the sides of the deck which you were referring to and also with respect to the front and back ends of that particular deck?

A. Well, the burlap was stowed all over the hatch just about level.

Q. And how were they stowed?

A. They were stowed in tiers on the flat.

Q. When you speak of "flat" what do you mean by that?

A. Well, the bale has an edge to it; there is an end to it; and there is a flat side. So they were stowed level on the flat.

Q. All right, suppose you describe for us the size of these bales, how big they were, and what general shape they (20) were.

A. Well, I would say they were about 4 foot long, about 3, 3½ foot wide, and about 2 foot thick.

Q. And when they were laid on there flat, then, they were laid on the 2-foot thick side; is that correct?

A. That is right. That is right.

Q. Now, how were they stowed with respect to looseness or tightness?

A. Well, they were stowed right across from one side of the hatch to the other in tiers, stowed tight.

Q. Do you have any idea what those bales weighed on that occasion?

A. Well, I would say from a thousand maybe to twelve hundred or thirteen hundred pounds.

Q. Was that the weight of each particular bale?

A. No, it runs anywhere from a thousand to twelve hundred. You know, they have different weights on some of them.

Q. How do you know what the weight of a particular bale is?

A. The weight is stamped on the end of each bale.

Q. Are there any other markings? Let us get down to this particular case: Were there any other markings on each bale?

A. Yes, you have the name of the port wherever it is to be discharged stamped on the same end.

(21) Q. Now, were these bales bound in any way with any material?

A. Yes, they have steel bands around them.

Q. How big are those bands?

A. Oh, I would say they were about an inch in width.

Q. And how are those bands joined together?

A. Well, you have what we call buckles. When they got them in the press they fit them with buckles.

• • •

Q. Did you in fact that day, Mr. Craft, use a certain device to raise these bales out of the hold?

A. We used burlap hooks.

(22) Q. Sir, I show you an object which I will have marked P-1 for identification and ask you if you can identify this object.

A. That is the same kind of hooks we used.

• • •

Q. What if anything is done with the individual hooks that you find at the ends of these ropes?

A. You puts two of those into each bale—one in each band.

Q. How many bands do you use on an individual bale with these hooks?

A. You only hooks in two bands, one with each hook.

(23) Q. So that two hooks are used with each bale?

A. That is right.

Q. In two different bands of the bale; is that correct?

A. That is right.

(Photographs marked Exhibits P-2, P-3, P-4, P-5, and P-6)

By Mr. Borowsky:

Q. Mr. Craft, I show you a photograph marked P-2 for identification and ask you if you can identify the objects shown in that photograph.

A. Yes, that is one of the burlap bales.

Q. Is that the type of bale that you were taking out of the No. 1 hatch aboard the SS "City of Calcutta" on July 1, 1955?

A. It was.

• • •

By The Court:

Q. Are there four bands to a bale?

A. Yes, sir.

• • •

(27) Q. Now, you took these three burlap hooks and you brought them down in the hold to start work; is that correct?

(28) A. That is right.

Q. Now, what happened after that?

A. Well, when they come down in the hold, he lowered them in the hold, I taken them off; I placed a set to each two of the mens, and then I leave one set hang there until whoever is going to start their draft first I will give them

that relief set, then I will remove the ring from the cargo hook and hook on the loaded draft, and they will bring it out under the hammer, if it ain't in the square, and steady it.

• • •

Q. What do they do with the hooks?

A. They hook them underneath the bands of each bale.

Q. And how many bales?

A. Two bands.

Q. Yes, but how many bales do they put the hooks under?

A. Three bales.

Q. They put two hooks under two bands on each of three bales?

A. That is right.

• • •

(41) Q. Was Leighton Beard one of the men working down the hold that day?

A. That is right.

• • •

Q. No, just answer my question: Did you see him involved (42) in an accident that day?

A. Yes, I was there.

Q. All right, will you please tell us what happened shortly before and at the time of his accident.

A. Well, we hooked on a draft offshore—

Q. When you say "we hooked on a draft"—

A. I hooked on a draft offshore. See, I was hooker-on.

Q. Where did you hook the draft to?

A. I got it from the offshore side, and I gave the signal to the hatch tender to bring it out under the hammer in the square of the hatch, so he pulled it out and picked it up and steadied it, and then he goes ahead out with it, and when—I watched the draft and it go up so far, near the top coaming, then I goes back underneath the coaming, and we hear somebody holler "Yo! Heads up!" and by the time we looked around the bale had fell in the forward

end and come rolling back to the after end and pinned Leighton against the bulkhead.

Q. Which bulkhead did it pin him against?

A. The after bulkhead.

• • •

(43) Q. Now, where were you when you saw these things happen?

A. I was in the hold right on the inshore side looking at the bale when it came down.

Q. Where did the bale land when it came down?

A. In the square of the hatch like, but it landed on its edge and it took a rolling tumble all the way to the after end of the bulkhead, with full speed.

Q. What if anything happened to the other two bales that were in that draft?

A. Well, he taken those two on out on the wharf.

Q. Well, did you see that?

A. Yes, they didn't come back in the hold. We seen it.

Q. Did you at any time look at the bale which had struck and had pinned Mr. Beard to the after bulkhead?

A. I did.

Q. What if anything did you notice about it?

A. Two of the bands broke off it.

• • •

(44) Q. How many men were with you?

A. Four beside myself—five of us in all.

Q. Well, were there three besides Mr. Beard down there, and besides yourself?

A. Yes, there was four besides myself. I was the fifth man down there.

Q. Mr. Beard was the victim of this, was he not?

A. Yes. There was three besides myself after he got hurt.

• • •

(45) A. Well, after we got a tray down there, we taken the tray over to him and picked him up the best we could

and laid him on the tray and straightened his leg out, and we picked the tray up and taken it out underneath the hammer before we hooked it on, and then one man went on out on the wharf with him.

Q. This tray was what? What did the tray look like?

A. Well, a tray is something, some of them got four corners to it, and you hooks a hook in it, or some of them is made with rope fastened in it just like it is fastened in the hook, and up to the center, just like that ring there, why you removes that hook—I mean that ring from the hook—just like you do the burlap hooks.

Q. Is that tray a wooden platform of some kind?

A. Yes, it is a wooden platform.

Q. And it has a rope at each corner or a cable at each corner?

A. That is right.

Q. And is that used to handle cargo, to move cargo, in and out of the vessel?

A. Yes, different kind of cargo you use that form.

Q. About how big is it?

A. I would say it is about 3 by 4 foot long, something like that, or 2½ by 4 foot.

(46) Q. That was lowered in the hold and Mr. Beard was placed on the tray; is that correct?

A. That is right.

Q. You say somebody rode out with him: What do you mean by that?

A. One of the men in the hold—if I ain't mistaken, Luther Montgomery went out with him.

* * *

(47) Q. What if anything did you notice about this particular draft as it was being hoisted out of the hold?

A. Well, it came out just the same as the rest of them. There wasn't no difference as I could never see.

Q. Did you work until that hatch was finished, as best you can recall?

A. Yes, after we went back I worked until the hatch was finished.

* * *

CROSS-EXAMINATION

(55) By Mr. Byrne:

Q. Mr. Craft, this bale that hit Mr. Beard, you say you (56) sent that out all by itself.

A. I did.

Q. And that was taken by the employees of the Atlantic & Gulf Stevedores who were working on the dock?

A. Well, I only hooked it on and sent it out the hold; I don't know what they did with it after it went out the hold.

Q. Was that the same day of the accident?

A. Was that the same bale?

Q. You sent it off the ship the same day the accident happened?

A. I just remember it was shortly after that, that same evening. We was taking it off height by height.

Q. And did you ever learn what had been done with that bale by the people who unhooked it on the dock?

A. I don't know anything about the dock. See, I was in the hold.

Q. Didn't you have a foreman there?

A. Yes.

* * *

(57) Q. Now, Mr. Craft, you have told the Court and jury that on this day and at the time just before this accident happened you were taking bales out of the hold, bales of burlap. Now, did the bales that were in the draft, the one that was being raised when Mr. Beard got hurt—did those bales come from this wing?

A. Well, it come from the wing kind of aft, offshore.

Q. The offshore wing aft?

A. Yes, near aft. It was under the coaming, offshore.

Q. A little bit back, but you would not say all the way back to the bulkhead?

A. No, sir.

Q. But a little bit out of the hatch square?

A. Back under wing there.

Q. Was it your practice on the day this accident happened, Mr. Craft, to have the hooks put in while the bales were in the stow?

A. Yes, you hooks the bales on when they are back in the tier.

Q. When they are in the stow. Now, when you have broken them out, as you call it—that is the term you use—you break them out of stow.

A. Yes.

Q. Did you then put them down in the square of the hatch and (58) unhook the hooks?

A. Yes, we brings them out under the hammer in the square of the hatch.

Q. Yes.

A. And then you steady them before you start up with them.

• • •

(59) Q. Now, Mr. Beard, from what you told us I gather, then, that you don't unhook the hooks from the bale between the time that you pull them out of stow and the time you raise them up out of the ship?

A. No, you bring them out under the hammer; it is a drag like.

• • •

(61) Q. Now, I notice that the hooks are sometimes in one spot and sometimes in another; is that true?

A. It is that way here.

Q. Well, is that the way you did it when you were unloading the "City of Calcutta"?

A. That is the way I hooked mine (indicating).

• • •

(62) Q. My understanding of your testimony, Mr. Craft, is that you did not actually place the hooks in these bales, that you had another job known as the hook-runner.

A. Not that particular day, but when I does hook on, that is the way I hook mine on.

Q. Oh, I see. Mr. Craft, you will have to understand that we are trying to find out what happened on this particular day.

A. I was the hook-runner that particular day.

• • •

(66) Q. I see. Now someone from the Atlantic & Gulf Stevedoring Company gave you instructions as to the proper way to hook them, I take it?

A. No, they never gave me any instructions. I been hooking them long enough to know how.

Q. No one from Atlantic & Gulf ever gave you any instructions as to the manner in which these hooks should be placed?

A. No, I was aware of it years ago. No one gave me any instruction on how to hook them on; I know how to hook them on.

• • •

(67) Q. So no one, as far as your knowledge goes, on the part of Atlantic & Gulf Stevedoring Company ever told you what the correct way was to put these hooks under the bands?

A. No, no one ever had to tell me; I already knew.

Q. The straps on the bales—all these bales come with four tightly fastened bands around them, do they not?

A. Yes, all the burlap bales have four bands around them.

• • •

(68) By Mr. Byrne:

Q. Are the bands loose or taut?

A. No, they are stowed tight in tiers.

Q. I did not ask you how they were stowed. I said the bands, the metal bands around each bale, are they loose or tight?

A. All of them is tight.

Q. Tight?

A. Tight.

Q. So that there is not much play in them?

A. No play in them at all.

Q. No play in them at all?

A. No, they are tight.

Q. And you saw no play in the bands of the bale that finally fell at the time this accident happened. Those bands were as tight as the others; is that correct?

A. When I hooked them on, when I drug them out in the hatch, they looked the same as the others to me.

Q. Now, you say when you "drug" them out of the hatch—excuse me; what did he say?

(The reporter read: "When I drug them out in the hatch.")

By Mr. Byrne:

Q. When you say "drug them out in the hatch," Mr. Craft, (69) you mean when you pulled them out of the stow?

A. When you pull them out of the stow into the hatch opening under the hammer of the boom. That is what you call dragging them out in the hatch.

Q. Right. And you used the same hooks in the same position on the same bands to drag them out as were used to raise them up; is that correct?

A. Yes, the same hooks.

Q. And the position of the hooks with respect to the band was not changed?

A. No, the hooks was put under there straight. As long as the hooks is under there straight and tight, when you steady your draft you picks it up clear and free.

• • •

(77) By Mr. Byrne:

Q. Now, Mr. Craft, am I to understand that no one from Atlantic & Gulf Stevedoring Company ever gave

you any instructions as to the proper way to place these hooks in bales?

A. Not as I can recall.

• • •

(78) Q. This burlap is considered heavier per bale than any other baled cargo that is discharged by Atlantic & Gulf?

A. I wouldn't say that.

Q. You wouldn't say that; what is as heavy?

A. You handle metal. You handle many things heavier than (79) burlap—bales of copper, brass and metal.

Q. Metal?

A. Yes.

Q. Does metal come in bales?

A. Some of it does, yes.

Q. And do you discharge metal with hooks under the bands?

A. No.

Q. I see. Is there anything that is heavier than burlap that is discharged by hooking under the bands?

A. Not as I know of.

Q. Now, Mr. Craft, have you seen bales of cargo discharged in ways other than using hooks?

A. Explain that again.

Q. Have you seen bales of cargo discharged—bales? Have you seen bales of cargo, any kind of cargo, discharged using some other method than these hooks?

A. Oh, yes, we have discharged metal with wire bridles—that is a lumber strap, they call it.

Q. What type cargo that comes in bales do you use this lumber strap to discharge?

A. That would be something like metal or brass or something like that.

Q. Anything else?

A. Not as I recall. We use them for lumber, different things.

• • •

(83) By Mr. Byrne:

Q. Mr. Craft, let us talk about the baled cargo for a minute. You have testified that the bales of burlap weighed somewhere between a thousand and fourteen hundred pounds, I think you said, didn't you?

A. Around a thousand to twelve hundred—different weight on them.

Q. Now, how heavy are these bales of metal?

A. Well, some of these goes 1400, 1500, such as that—different weight on all of them.

Q. Different weight on all of them, but that area is about 1400 to 1500?

A. Something like that.

Q. But you do not discharge these with hooks under the bands; you put a wire lumber strap around them; is that right?

A. You don't have bands on them like this; you have wire (84) around them.

Q. I see.

A. You wouldn't put a hook in a wire.

Q. What other commodity comes with these steel bands, Mr. Craft, in your experience?

A. As well as I can recall, wool comes in steel bands, not as heavy.

Q. How heavy is a bale of wool?

A. Well, I would say 250, 300 pounds and all like that.

Q. Is there anything that comes in bales that is anything over a thousand pounds?

A. Not as I can recall.

Q. Not as you can recall?

A. No, burlap is the heaviest that I can recall coming with bands around it.

Q. I see; and as a matter of fact the burlap is almost as heavy as the bales of metal?

A. Well, I wouldn't say. They run different weight.

Q. I understand, but you said within a hundred to two hundred pounds the weights were about the same, didn't you?

A. I don't know the exact weight on all of none of them, but they average from a thousand to twelve hundred or maybe more and metal runs something like the same—brass, that we handle.

(85) Now, is there any other commodity that comes that is as heavy as burlap?

A. Not that you use no hooks on.

Q. No, that wasn't my question, Mr. Craft. Is there any other commodity that comes in bales that runs as heavy as burlap?

A. Not as I know of.

Q. And whether you use hooks on it or not, I just want to know bales that would run over a thousand pounds per bale.

A. Not as I know of; I can't recall any.

* * *

(108) PERRY LEE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Borowsky:

Q. Mr. Lee, what was your occupation on July 1, 1955?

A. I was a hatch boss.

Q. Who was your employer?

A. Atlantic & Gulf Stevedores.

* * *

(109) Q. Were you in charge of a gang of men that were working on the "City of Calcutta" on that day?

A. I was.

* * *

CROSS-EXAMINATION

(131) By Mr. Byrne:

Q. Mr. Lee, I show you one photograph—unfortunately it is not marked—which shows two bales, one alongside the other, with the bands all running the same way. This other photograph D-1 shows one bale—apparently

two bales alongside each other are roughly parallel and then the one out on the side is at right angles, because you can see the straps on the bale on the right and you can't see them on the other two bales; and then here on photograph P-6 there is a photograph of bales, one of them flat and two of them running in at angles. Now, that is the kind of description I would like you to give the Court and jury, if you can, as best you can, as to the way in which the bales in this particular draft were arranged.

The Court: First, does he remember how they were arranged?

The Witness: I cannot say, because I don't (132) realize how the bales was laying when they came up out of the hold. All I know, it was three bales.

Q. I see, so they may have been at right angles, or they might have been parallel to each other?

A. That I don't know. I don't know how they were laid.

Q. I suppose one strap broke a moment or so before the other, didn't it?

A. Right.

Q. So that the weight of the bale after the first strap broke—the whole weight of the bale was on the second one for a short period of time, a moment or so?

A. I don't know about the weight; all I know is when one band bust loose the other one bust loose.

Q. I see, but it was first one, and then the other?

A. That is right.

Q. Now, can you tell the Court and jury on the bale now where the bands broke where the hooks were with respect to, let us say the flat side of the band, or were they up near the corner? In other words some of these photographs show some of these hooks in what I will call the flat side.

A. Well, that's—

Q. Just a minute. Here on P-6 the hooks seem to be right at the turn—do you see what I mean?

And here is another bale in photograph P-6 (133) where they are close to but not quite at the turn. Now, can you tell the Court and jury where these hooks were on the particular bale that fell?

A. As far as I could see I don't know if it was on the flat or on the edge: All I know, it was three bales.

Q. You don't know. Are you telling me you don't know whether it was on the flat or the edge, but you are sure that it was not right at the turn?

A. I don't know if it was on the turn; all I know, it was in the middle, the middle of the two bands.

Q. The middle of the two bands?

A. The two bands was in the middle of the bale.

Q. Now, have you ever seen one of these bales of burlap or gunnies where the one strap supported the weight of the entire bale?

A. No, sir.

* * *

(134) Mr. Lee, did you ever receive any instructions from anyone as to the proper method of inserting these hooks into the straps of the bale?

A. Receive any message?

Q. Any instruction? Did anybody ever teach you, show you, where to put these hooks or how to put the hooks in?

A. Well, when I first went with this company, and that is the only way—they were using it when I went there, and that was the only way they were using it from that time up (135) until now.

Q. All right, who gave you that instruction?

A. Well, that is the ship boss.

Q. Who was that?

A. It was one of those ship bosses for the Atlantic & Gulf Company.

Q. What was his name?

A. I really don't know which was his name; they got so many around there.

Q. How long ago was that?

A. That is long—way back—about fifteen years ago.

• • •

Q. If I understand your testimony, you said that someone from Atlantic & Gulf did show you the proper way and the proper place to insert these hooks when you were lifting these bales; is that right or not?

A. Yes, sir.

(136) Q. All right. Now, what did they show you?

A. They showed—they showed us—they showed us how to hook the hooks in the middle bands.

Q. They showed you how to hook the hooks in the middle bands.

A. In the two middle bands.

Q. And did they tell you where on the bale to place the hook, whether to place it at the flat?

A. That, they didn't tell us that.

Q. They didn't tell you anything at all about that?

A. No.

Q. You are sure?

A. Definitely.

Q. Therefore you as a hatch foreman have never given instructions to men under you on that subject, have you?

A. I didn't.

Q. Mr. Lee, you have looked at these three photographs; you will agree that the photographs show that the hooks are inserted at various parts of the bale, various places around its circumference, are they not?

A. I don't understand you.

Q. Take a look at them. Circumference means around—

Mr. Borowsky: Circumference of the band?

Mr. Byrne: The way the strap runs around the bale.

(137) By Mr. Byrne:

Q. I ask you to look at these three photographs again. One is an unmarked photo, one is D-1, and the other is P-3, and I ask you if they don't show that those hooks—look at all three of them, Mr. Lee; I don't want you to answer on just one—don't they show that the hooks are inserted at various places? Some places it is right on the flat, some places it is up at the corner?

A. Yes.

Q. And it is your testimony that so far as you know it doesn't make any difference where a hook is inserted; is that correct?

A. Yes.

Q. And no one from Atlantic & Gulf Stevedoring Company ever told you that there was a proper place, and also an inproper place, to insert those hooks; is that correct?

A. No.

Q. How long have you worked for that company?

A. Been working for that company four years—boss four years before the accident happened.

• • •

(138) Q. When you have seen these bands break, and you have seen them break at some times in the past, haven't you?

A. I saw a few.

Q. Where was the hook with respect to where it was around the band, whether it was on the flat or on the corner or on the side or where it was?

A. The few I saw pop, or busted in some time stowed tight under the coaming, and they try to pull it out.

Q. I see; that is the only time you have seen these bands break?

A. That is the only time.

Q. It is during the breaking out operation that the greatest strain is imposed upon them; wouldn't you say that that is true?

(139) A. Great strain pulling on it?

Q. Yes.

A. Right.

• • •

Q. Now, who told you to bring up these bales at a time, Mr. Lee, rather than two?

A. That is the rule of the company.

Q. Well now, some of the drafts in the photographs which are taken of an operation by Atlantic & Gulf Stevedoring Company show only two bales to a draft.

A. That is possible you only could get two at that time.

Q. I see. Who told you to put three bales on each draft rather than two bales?

A. That is the rule they make, for three bales.

Q. I understand that, but I want to know who promulgated the rule.

A. Well, the stevedore, I guess.

Q. Was it your supervisor or your boss?

A. The company I work for.

• • •

(140) Q. By the way, you have said that there was cargo for (141) two different ports in this same hatch; do you recall saying that?

A. Yes, sir.

Q. That is a frequent arrangement, is it not?

A. Sir?

Q. That is a frequent arrangement, is it not? That often happens?

A. Yes, sir.

Q. In other words, you were experienced and familiar with that situation and you knew what to do when you had what the men along the waterfront call a "split hatch"?

A. That is right, sir.

Q. Now, Mr. Lee, didn't anybody ever tell you—anyone from Atlantic & Gulf—to instruct your men to keep the hooks away from the buckles when they inserted them?

A. No, sir.

Q. Never did. Did you ever examine the buckle that closes these steel bands carefully to see how it worked?

A. Never.

Q. Did anybody ever explain to you how these buckles worked?

A. No, sir.

Q. Did you ever notice that when you inserted the hook near the buckle that you had a tendency to pull the band out of (142) the buckle and defeat the very purpose of the buckle?

A. I don't understand you.

Q. Well, the buckle works, doesn't it, Mr. Lee, by its own pressure upon itself; doesn't it? Somewhat like a belt that does not have holes in it? You have seen belts like that, haven't you?

A. Yes sir.

Q. Doesn't this buckle work the same way approximately, the same principle?

A. It looks that way.

Q. It looks that way; and doesn't it make sense to you, Mr. Lee, that if you put the hook right at that buckle you tend to pull it up so that—in other words, if I had one of those buckles and I just pulled the top of the buckle, it would tend to become loose, wouldn't it?

A. Well, I don't know how them boys had the hook.

Q. I understand that. That has not been established, but I know whether anyone from Atlantic & Gulf didn't ever warn you that if you inserted the hook near the buckle you were defeating the very purpose of the hook and making it more likely that it would pull out?

A. No, sir.

Q. Didn't you ever examine it yourself and figure that out?

A. No, sir.

• • •

(143) By Mr. Byrne:

Q. Mr. Lee, before I go into this I just want to ask you one question: Isn't it a fact that usually the buckles that join the two ends of these bands together are on the flat surface somewhat like they appear in that photograph?

A. Yes, sir.

• • •

Mr. Lee, I hand you or show you a paper which the reporter has marked D-3. First of all, I ask you if that is your signature on Page 4.

A. Yes, that is my signature.

Q. Now, is that your signature on the margin of Page 3?

(144) A. Yes.

Q. And the margin of Page 2?

A. Yes.

Q. And the margin of Page 1?

A. Yes.

Q. Now, Mr. Lee, would you then take a look at that statement which is dated the 7th of December, 1955, at 8 p.m. and read it over and see if there is anything in that statement with which you now disagree, and I direct your attention specifically to the question of the frequency with which these bands break during the unloading operation of these burlap bales—bales of burlap.

A. Who have to read it?

Q. Pardon me?

A. Who have to read it? Can't you read it?

Q. Yes, if you want me to read it. Can't you read it?

A. I don't read.

Q. I will read you a part of it, Mr. Lee.

• • •

(145) Q. I am going to read you Page 4:

"I did not examine the bale with the broken straps after the accident. We did put the hooks on the two straps at each end and took it out of the hatch without any trouble. I do recall that when the first strap broke it pulled

out from the socket where the strap was joined together. I don't know where the second strap broke.

"After the accident, we finished working the hatch without any further trouble. We never did have (146) any trouble with either the ship's winches or gear.

"I believe that these bales came from England. In my experience, I have seen these metal straps break many times. I have also seen the one remaining strap hold the weight of the bale even after the other had broken."

The concluding line says, "I have read this statement and it is true and correct," and under that there is what you identify as your signature; is that right?

A. Yes, that is right.

Q. Now, is there any part of that which I have just read to you, Mr. Lee, that is not correct?

A. There was one you read that is not correct. I never remember telling anyone that I see one strap, one band hold after one part.

Q. Well, whether you remember telling anyone that, Mr. Lee—let us talk about this sentence, the one that says, "I have seen these metal straps break many times." Now, is that true or is it not?

A. Many times?

Q. Yes.

A. Well, just like I told you now, I saw it break, bust, a few times.

Q. Well now, does "few" mean "many" or—

(147) A. Well, could be many. Few could be many.

Q. How many times in the course of a month would you say you have seen these straps break during this unloading operation?

A. Well, I don't know, but—

The Court: Keep your voice up; I can't hear you.

The Witness: I don't know. Not many times I see it bust. Just like I told you, it was a few times but I couldn't tell you how many times.

* * *

(152) Q. Now, we come to Page 4. "I did not examine the bale with (153) the broken straps after the accident. We did put the hooks on the two straps at each end and took it out of the hatch without any trouble. I do recall that when the first strap broke, it pulled out from the socket, where the strap was joined together. I don't know where the second strap broke." Is there anything wrong with it so far?

What is your answer?

A. No, sir, ain't nothing wrong with it.

Q. "After the accident, we finished working the hatch without any further trouble. We never did have any trouble with either the ship's winches or gear." Right so far?

A. No, sir.

Q. Pardon?

A. Never had no trouble.

Q. But my question is, the statement is right so far? The answer to that is yes?

A. Yes, sir.

• • •

(155) Q. And these hooks—no question about it, they are supplied by Atlantic & Gulf Stevedoring Company?

A. Yes, sir.

• • •

(158) Q. Did anyone ever tell you what the tensile strength of these bands was?

A. No, sir.

• • •

By Mr. Marshall:

• • •

(159) Q. Is Atlantic & Gulf the only company that you are familiar with in your own experience where you have seen bales of burlap being unloaded?

A. That is true.

Q. None of the other companies handle that type of cargo?

A. I don't know that.

Q. I mean, have you ever seen any other company unload burlap?

A. No.

• • •

(160) Q. All right. Mr. Byrne covered with you the various positions that the bales seem to take as they are being lifted. As a matter of fact, almost every draft where you (161) have three bales will have some movement of those bales once you pull them out or break them out of the stow; is that correct?

A. Right.

Q. And doesn't that depend on the position that the three bales fall into as they are brought out to the position under the hammer which Mr. Craft was talking about? Do you understand what I mean?

A. I don't.

Q. Well, in some cases, for instance—if I may be excused for holding these three Bibles—in some cases, for instance, you may have the three bales brought out—let us that this is the center of the hatch where I am standing— you may have the three bales brought out together, side by side.

A. Right.

Q. And in other instances, because of the difference in pull, or the difference in weight, or the difference in position, you may have one bale slip over and have them brought out so that they are like on three corners; isn't that correct?

A. That is true.

Q. And depending on the position of those bales will depend on where the hook actually ends up once it is taken up to the top; isn't that correct?

A. That is true.

• • •

(163) Q. The bands that you have seen broken, can you tell us (164) whether they were confined to instances where the bales were being pulled out of tight stowage?

A. They had been busted by pulling out tight stowage.

Q. Would you by any chance, Mr. Lee, have any way of knowing what happened to the bands that broke and dropped the bale that struck Mr. Beard?

A. No, sir; I don't know.

Q. Do you have any recollection of seeing them afterwards?

A. No, sir.

Q. Now, you told us that there were ship's officers who would come back and forth, and I think you told us some of them looked down into the hatch. At the time that they looked down into the hatch was this loading procedure under way? In other words, were you unloading these bales while they were looking in and out?

A. Yes, sir.

Q. Did you actually see any of the ship's officers look down and observe this operation?

A. Yes, sir.

Q. And were you present when that took place?

A. Yes, sir.

Q. Could you tell us whether or not any of those ship's officers said anything to you about not doing it this way or doing it some other way?

(165) A. Never.

Q. Have you ever had anyone suggest to you a better or a different method from the one that you were using on that day?

A. No, sir.

* * *

RE-DIRECT EXAMINATION

(169) By Mr. Borowsky:

* * *

(170) Q. And do I understand you to say that you have been taking out bales of gunnies from the "City of Cal-

cutta" before July 1, 1955?

A. I did.

Q. And upon those occasions, the officers of the ship, were they present or not present when the bales were being removed?

A. They were present.

• • •

RE-CROSS-EXAMINATION

(178) By Mr. Byrne:

Q. Let me go back, because I hadn't finished, Mr. Lee. You told us that the only time you had seen these bands break was when these bales were being pulled out of the stow where they were packed tight one against the other; that is what you said.

A. Correct.

Q. Now, did anyone from Atlantic & Gulf ever instruct you to have the men remove the hooks from the bands after the bale had been pulled out of the stow and hook them into two different bands for lifting them up?

A. No, sir.

Q. And you didn't do that this day?

A. No, sir.

Q. You used the same two bands to lift with that had been used to pull the bale out of the stow?

A. Yes, sir.

Q. And so far as you know, nobody—strike that question. (179) So far as you know, you can't tell whether that band—a tear of that band had started at the time it pulled out of the stow or not?

A. That I don't know.

• • •

(181) Q. But you cannot testify whether any broke during the breaking out operation or not?

A. Not as I know of.

• • •

(182) JAMES RILEY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Borowsky:

(183) Q. Mr. Riley, were you a member of Perry Lee's gang the day Leighton Beard got hurt?

A. Yes, sir.

Q. What was your particular job that day?

A. I was operating a winch.

Q. Will you please tell us where the winch that you operate was located?

A. Located on the offshore side.

• • •

(191) Q. What if anything did you notice about the manner in which the winch was responding to your controls as you were bringing up this draft?

A. The winches were running very nicely, like I started.

• • •

(205) LUTHER MONTGOMERY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • •

By Mr. Borowsky:

Q. Mr. Montgomery, were you also a member of Perry Lee's gang on the day Mr. Beard got hurt?

A. Yes, I was.

Q. What was your particular job that day?

A. Hold man.

Q. Did you work with anyone down in the hold or did you work alone?

A. I worked with Leighton Beard.

• • •

(208) Q. Which bales did you put into those hooks? Did you follow any order, or did you take the hooks and put them anywhere that you could get hold of a bale?

A. You don't have to particular put them in no particular band on the bale—any two bands on the bale—but we usually use those bands.

* * *

(212) Q. What if anything can you tell us about the movement of that draft from the time that there was first a strain on the burlap bale hooks until the time that it passed beyond your sight?

A. I saw nothing different than the rest of them. I didn't see nothing different in that one than I did the others.

* * *

(216) Q. What kind of gear did you use to remove the bales on those occasions?

A. The same type hooks we have here.

Q. You are now referring to that which I called your attention as P-1; is that correct? Had anyone ever told you not to use those hooks in removing these bales of gunnies by putting the hooks into the bales?

A. No, they don't; they give us the hooks to work with. We don't collect no gear; we work with what gear they give us to work with.

Q. Has anybody ever warned you about the use of these hooks in these bands?

A. No, they haven't.

Q. Have you worked bales of gunnies on City ships since the accident July 1, 1955?

Mr. Byrne: Objected to.

A. Directly, I don't know.

The Court: What is your objection?

Mr. Byrne: The same objection as before. I don't know what "City ships" means.

The Court: I don't think it makes any difference, do you? They are the same bales. What difference does it make what ships they were on?

(217) Mr. Borowsky: Let me bring that out, Your Honor.

By Mr. Borowsky:

Q. Have you discharged bales of gunnies that were bound with these steel straps or steel bands since July 1, 1955?

A. Sure, I have.

Q. In what manner have you discharged those bales?

A. In the same manner we discharged these in.

Q. And did you use the same type of hooks?

A. Ever since I discharged them that is the type of hook we have been using.

Q. Have you ever observed any other stevedores discharging these bales in the Port of Philadelphia?

A. No, I haven't.

Cross-Examination

By Mr. Byrne:

* * *

(218) Q. Have you discharged cargo in bales when you worked for other stevedoring companies?

A. Not bales of gunnies.

Q. No, I mean baled cargo.

A. I thought we were talking about the bale on this particular ship.

Mr. Borowsky: They were my questions but he is asking you another question.

Mr. Byrne: Will you read the witness my question.

(Question read by the reporter as follows:

"Have you discharged cargo in bales when you worked for other stevedoring companies?")

The Witness: Yes, I have discharged bales.

By Mr. Byrne:

Q. I show you a picture which is Exhibit D-2 in this case. Have you ever discharged cargo which was packed in bales by the use of a sling like that or similar to it?

A. I don't know.

Q. You don't know?

A. No, I don't.

Q. You mean you don't remember?

A. No.

Q. Have you ever discharged bales of cargo in rope slings?

(219) Do you know what I mean by "rope sling"?

A. Sure.

Q. In other words, almost like a big net?

A. Sure, I have.

Q. Your answer to that is yes?

A. Sure, I have.

Q. What stevedoring companies did you work for when you did that?

A. Jarka, also Atlantic & Gulf.

Q. So sometimes Atlantic & Gulf in your experience uses a great big square net to lift baled cargo out; is that right?

A. Certain types of cargo.

Q. And the same is true of at least one other company known as Jarka Stevedoring Corporation; is that right?

A. Sure.

Q. And you would have used that sort of gear if it had been furnished to you by Atlantic & Gulf Stevedoring Company on this particular day, wouldn't you?

A. I use what the company give me. I don't collect gear. Like I say to you before, they have a gear man. We don't give orders; we take orders; we work with what the company give us to work with.

• • •

(220) Q. I see. Who hooked in the draft that was being taken out at the time this accident happened?

A. George Hudson and Willie Jinnifer. That draft came from offshore; we were working inshore.

• • •

Q. Was this cargo, from what you observed, stowed pretty tight, pretty snug?

A. It was stowed in the usual manner.

Q. The usual manner means it is stowed snugly, doesn't it?

A. Well, some tiers was complete and some was not.

Q. Did anyone from Atlantic & Gulf ever advise you to remove the hooks from the two straps or metal bands to which they had been attached when you were breaking it out and put it into two other ones before you lifted it up?

A. No.

(221) Q. Did you happen to notice this particular draft that went up, the one that caused this accident?

A. Yes, I saw it when it went into the hatch.

Q. You saw it when what?

A. When they pulled it out in the square of the hatch.

Q. Not when it started up?

A. Yes, I saw it when it leave.

Q. Now, can you take a piece of paper and draw for me the way in which those bales were arranged? You see, there are a number of different ways, and to help you, Mr. Montgomery, I will show you some photographs, and you will see that the bales in the draft take different shapes, in other words, different arrangements as they are being lifted, and I thought maybe since you had seen this particular draft come out that you might be able to help us by drawing a picture for the Court and jury which would show us how these particular bales were arranged. Now, there is one photograph.

A. I can't draw no picture of how a bale was arranged.

• • •

Q. What I meant is that sometimes bales go out so that they are all in a row like this, one alongside the other.

(222) Then they are some photographs that show one bale over here, sort of two on one side and one on the other; some of them with bands running one direction, some with the bands running a different direction. I was wondering if you could tell the Court and jury how they—

A. Well, I couldn't exactly tell them that. All I know, the bales was leaving the hold. How they was running, I coudn't explain that to you.

Q. Could you tell where on the surface of the bales the hooks were inserted? I am going to show you P-4. That shows some hooks inserted right in the center of what I will call the flat, then if you will look at P-6 you will see some of the hooks are inserted at different places. This one is inserted right at the turn, and this one on the right, the hooks are inserted a little below the turn, and on the third one here they are inserted right off the flat. Could you tell us how they were inserted in this—

A. No, I can't explain that to you. I will tell you why. When I hook my draft on I was back underneath the coaming of the deck. That draft was partically as far from me as from here to Mr. Borowsky sitting over in that chair. I am underneath the wing when he pick it up. As soon as that draft leave I go back to the bulkhead. I don't know how he is going to pick up the draft.

(223) Q. In other words, you didn't notice this particular draft?

A. No.

* * *

(227) LEIGHTON BEARD, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Borowsky:

Q. Mr. Beard, where do you live, please?

A. Philadelphia. 5741 Pine Street.

* * *

(228) Q. And after you got aboard the vessel where did you begin to do your work?

A. I began my work on the inshore side of the ship in No. 1 hold.

• • •

Q. Did you work alone or did you work with someone else down there?

A. I had a buddy I worked with. He name was Luther Montgomery.

• • •

(229) Q. Now, at what time of the day, if you can recall, did your accident happen?

• • •

(230) A. Well, as far as I could remember, I guess it was around 4 or 4:30; I can't say definitely what time it was.

Q. And at that time can you tell us how much, if any, bales had been taken out in a tier or more?

A. Well, we had taken out a tier and started on the other tier, I think. I think it was practically two tiers was taken out.

Q. Are you certain there was at least one tier removed?

A. Yes, I am sure there was one tier removed.

• • •

CROSS-EXAMINATION

By Mr. Byrne:

(257) Q. Now, Mr. Beard, did you work pretty often for Atlantic & Gulf Stevedoring Company before this accident?

A. That is right.

Q. And have you unloaded burlap for them?

A. Yes, the day I got hurt I was unloading burlap.

• • •

Q. Any other day before that?

A. No. No, not for Atlantic & Gulf.

Q. Did you get any instructions from anyone of Atlantic & (258) Gulf as to the proper method of inserting the hooks into the bands of these bales?

A. No, I didn't get any instructions from anyone.

• • •

(281) WILLIAM JINNIFER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Borowsky:

Q. Mr. Jinnifer, you are a longshoreman, are you not, by occupation?

A. That is right.

Q. And you were a member of the gang of Perry Lee, which gang was working on the SS "City of Calcutta" on July 1, 1955, were you not?

A. That is right.

• • •

(283) Q. Did you have anything to do with the bales that were in the draft that was involved in this accident?

A. Yes, I did. I hook on, so I hooked them on.

Q. Will you tell us where those bales were, and what you did, and how you went about hooking them on.

A. There were three bales in a row, we hook on, or two bales in the second band, take the hooks and put in the second band.

• • •

(284) Q. And how did you put the hooks in there?

A. We pulled them in.

• • •

Q. Did the hook-on man come over?

A. Yes, he hooked the bales on then he told us to step back. He always tell us, so we walk to the after end of the ship.

Q. And then what happened, if anything?

A. Afterwhile I hear somebody holler "Look out!"

• • •

(285) Q. You say the bale hit a New York bale?

A. Yes; that is right.

Q. Where were the New York bales?

A. In the forward end.

Q. How far did they extend into the center of the hatch, if you know?

A. I wouldn't know that.

Q. Were the New York bales at that time on the same level as, higher than or lower than, the Philadelphia bales?

A. They were higher than the Philadelphia bales. The Philadelphia bales were lower.

Q. How much higher, do you know?

A. I would say about two — two rows higher.

• • •

(287) Q. When you got back into the hold did you go back to work?

A. I did.

Q. Who did you work with?

A. I worked with George Hudson.

(288) Q. And what did you work with, what hooks? Strike that. What did you use at your work?

A. Hooks.

Q. The same hooks you had been using before?

A. That is right.

Q. And did you complete the job of removing the bales that day for Philadelphia?

A. That is right.

Q. Did you at any time notice the bale that was on Mr. Beard and take a look at it? Do you know what it looked like?

A. No, I know the hooks was broke; that is all I remember. I seen the hooks come, and I seen the bale come down. I know there wasn't no two hooks on it.

• • •

Q. When you say the "hooks broke" —

A. I mean the hooks wasn't on the bale. See the band was broke but there wasn't no hooks on the bale when it come down; that is what I am talking about.

• • •

(289) Q. I am talking about that particular bale. Did you notice anything about the bands on that particular bale?

A. Yes, there wasn't but two bands on it.

Q. Where were those two bands, if you know?

A. Down in the hold.

Q. Had any of the bands broken before this accident had occurred to Mr. Beard?

A. No, it hadn't.

• • •

CROSS-EXAMINATION

By Mr. Byrne:

Q. Mr. Jinnifer, you testified that you were the man or one of two men who hooked the hooks under the bands on the bales that comprised the draft that was being taken up at the time one fell and Mr. Beard was hurt.

A. That's right.

Q. That's right. Now, do you know whether it was you or your partner, Mr. George Hudson, who actually hooked the bale that fell?

A. No, I wouldn't know that.

• • •

(293) Q. Well, you can put these hooks in, in several ways. I am going to show you some photographs in a moment, but you can put two hooks in so that they are this way to each other, or they both run in the same direction.

A. Both hooks runs the same direction — that is the way I hooks them.

Q. Both hooks run the same direction?

A. Yes.

• • •

(296) Mr. Marshall: For the record I would like to have it stated that he is indicating that the hooks are in such a position that the end of the hook faces the op-

posite hook; in other words, that the ends are faced toward the center.

Mr. Byrne: I agree.

• • •

(297) Q. Now, Mr. Jinnifer, is it your testimony that that is the proper way to put in these hooks?

A. That is the onliest way I ever hook them — hook them.

Q. That wasn't quite my question, as to whether that was the only way you ever hooked them or not. My question was, is that the only proper way to hook them.

A. The only proper way?

Q. Yes; in other words —

A. That is the onliest proper way to me—I hook them.

Q. Did anybody ever tell you there was a right way and a wrong way to use these hooks?

A. I have been using them that way, the way I was using them that day.

• • •

(299) Q. Well, let us start over again on a little different tack. Did any of the foremen for whom you have worked ever give you instructions or show you as to the right way or the wrong way to hook them?

A. There ain't no wrong way; there's a right way.

Q. You say there is no wrong way?

A. No, when you hook them in the bands that way, that is the right way.

Q. Is there any other right way?

A. Any other right way.

Q. Yes.

A. That is the onliest right way I know.

Q. The only right way you know?

A. That is right.

Q. So what you are testifying to, then, Mr. Jinnifer, is that this photograph Plaintiff's Exhibit 4 shows hooks that are hooked the wrong way, doesn't it? (Showing witness)

A. One is hooked the right way, one is hooked the wrong way. One is for pulling and the other is for carrying it.

Q. In other words, one of those hooks is not right; is that correct?

A. One of them is not right.

• • •

(300) Q. Is one of them hooked wrong?

A. Both of them are hooked right, but one is for pulling, the other is for carrying.

• • •

(301) Q. In other words, those hooks which are in that photograph—do you say they are hooked in properly, or they are hooked improperly, meaning not properly?

A. What did you say? I say they are hooked in the bands properly.

Q. They are hooked properly.

A. The second band. They are both hooked in the second band.

Q. Both are hooked in the second band, but isn't it true that that photograph Plaintiff's Exhibit 4 shows the open end of both hooks running the same direction, as I am holding them now?

A. That is right.

Q. Now, didn't you just get down here about three minutes ago and tell us that the onliest right way was to have it so that the open end of the hooks faced each other?

(302) A. I said that is the way I hook them, you understand.

Q. Now, which way is right?

A. Both ways is right if it carry the bale out.

Q. Both ways are right?

A. One is for pulling and the other is for carrying. They might have been pulling this bale.

Q. What do you mean by "pulling?"

A. Might have been pulling it out of the hatch so they can set it down and rehook it.

Q. Set it down and rehook it?

A. That is right.

Q. Oh, but if you are going to have the hooks the way I am holding them and the way they are shown in Plaintiff's Exhibit 4, in other words, with the open end, both open ends, both pointed in the same direction, you have to rehook it before it is proper; is that your testimony?

A. That is what I am trying to tell you, but we done pull it that way.

Q. So that it would be improper from your testimony to lift out a bale that was hooked as the hooks are placed on Plaintiff's Exhibit 4?

A. Yes, and then set it down and rehook it.

Q. In other words, if you lifted it out like that, that would be wrong?

(303) A. That is right.

* * *

(306) Q. Did you ever get any instructions from Atlantic & Gulf Stevedoring Company—in other words, any foreman—as to where you should put these hooks in relation to the buckles that hold the band?

A. The buckle is always turned down.

Q. The buckle is always what?

A. The buckle is always down, and the band is always clear on top, smooth band.

Q. Will you explain to me what you mean by that. Do you mean to say that you never should hook a bale on the same flat surface where the buckle is?

A. The buckle is always down.

Q. What do you mean by buckle down?

A. The movement of the bale—the band is up top; the buckle is always down.

Q. The buckle is on the bottom?

A. Yes, the buckle is always on the bottom.

Q. So that it would be wrong if just by chance—

A. I wouldn't know nothing about being wrong, nothing about that. Every buckle is up.

Q. Just listen to my question. Is it your testimony that if just by chance one of these bales was so stowed that the (307) buckle was on top that it would be wrong to use the hooks on that side, and that the only proper way to do it would be to turn the bale over?

A. I wouldn't know.

Q. You don't know?

A. I don't know that. I can't answer that question.

* * *

(309) Q. Would you say that the hooks shown on P-4—you have already seen that photograph before, haven't you?

A. I think I have.

* * *

Q. All right, take another good look at it.

Are those hooks placed—just the one, the one you have got in your hand—are those hooks placed properly in all respects to carry that bale out of the hold?

(310) A. That is placed by the bands—I mean placed by the buttons.

Q. I asked you if they were placed properly.

A. Placed properly?

Q. Yes, sir.

A. No, they ain't placed properly.

Q. They are not? So that there is a right way and a wrong way, isn't there, Mr. Jinnifer?

A. A right way and a wrong way?

Q. Yes, sir—in which to place these hooks?

A. From the end you just place them in the second band; that is the right way. That is the way I always put them.

Q. Is that the only reason that you said that this photograph P-4 showed the hooks placed not properly—because one of them is in the end band?

A. That is what I go by—one in the end band.

Q. I see. In other words, that is the only thing you see that is not proper about the way these hooks are in?

A. That is right.

Q. In other words, the fact that they are both right next to the buckle—

A. Yes.

Q. —and the fact that they are both pointing in the same direction doesn't mean anything to you?

(311) A. As long as they are in the second band.

Q. As long as they are in the second band. Who told you that?

A. I told myself, because I have hoisted them out enough, seen them go out enough.

Q. Oh, in other words, what you are telling us about right and not right is what you yourself think?

A. That is right.

Q. In other words, nobody has ever told you that one way is right and the other way is wrong?

A. No.

Q. And no one from Atlantic & Gulf ever gave you any instructions or showed you a right way and a wrong way?

A. Showed me a right way and a wrong way?

Q. Yes.

A. No, I learned from the men in the hold; I got to go in the hold and look at the other men hook on.

Q. But any of the foremen, the hatch foreman, the ship foreman, or anyone from Atlantic & Gulf Stevedores?

A. I don't know the ship foreman.

Q. What?

A. I don't know the ship foreman.

Q. Do you know the hatch foreman?

A. Oh, yes, I know Perry.

(312) Q. Do you know any other hatch foreman?

A. Yes, I know plenty of them.

Q. For Atlantic & Gulf?

A. I work for Perry; I don't work for the rest of them, but I know them.

Q. I see. But nobody ever showed you the right way or the wrong way to hook on these bales; is that right?

A. No; I go down with somebody else that knows, that has hooked them on before, and I hook them on like they hook them on.

Q. Now, in answering Mr. Borowsky before lunch, Mr. Jinnifer, he asked you some questions about whether you saw this bale in the hold after it fell; do you remember that?

A. Sure, I remember.

Q. And I think he also asked you whether you saw the two bands that broke off, and you said you saw them down in the hold.

A. That is right.

Q. That is right. Now, where were they in the hold?

A. Laying right in front of the New York bales, most of the New York bales.

Q. Who took them?

A. I don't know who took them.

Q. Did Mr. Perry Lee go down in the hatch when the accident (313) happened?

A. Yes, he went down in the hatch. He helped put the man—

Q. Did anyone else from Atlantic & Gulf, any other of the longshoremen, whether they were just workmen or foreman, did any of them go down in the hatch?

A. Go down in the hatch?

Q. Yes.

A. I wouldn't know that.

Q. You were there. Didn't you see them?

A. I seen my boss go in the hatch.

Q. That is Perry Lee.

A. That is Perry Lee.

* * *

(314) Q. Nobody from the ship came down there, did they?

A. Anybody on the ship came down there?

Q. Yes.

A. No, because the mates didn't come down; they stood and looked in the hold.

Q. Stood up on the deck?

A. And looked down in the hold.

Q. And there were five men from Atlantic & Gulf Stevedoring Company down there?

A. Five men? Sure, there was five men.

Q. Five men—Mr. Perry Lee, you, and Hudson, and the two fellows that were working the other side—and you don't know what happened to this broken band.

A. What happened to them broken bands; that is right—two broken bands.

Q. What did you do, leave them there?

A. I don't know. I wouldn't know that.

Q. Well, you say they were lying right in front of the New York cargo?

A. That is right.

Q. They would be in your way there, wouldn't they?

A. How could they be in my way if they are laying on the skin.

Q. On the what?

(315) A. Here is a New York bale here. They were working back here. They wouldn't be in our way.

Q. I know, but you had to drag these bales to the middle.

A. Drag the bales to the middle, sure, but that wouldn't make no difference about them bands.

Q. They were lying right there but you don't know what happened to them?

A. No, I don't know what happened to them.

* * *

Q. Now, as I understand it you hook on these hooks one way if you want to pull it out of stow, and you hook them on another way when you want to lift them up; is that right?

A. Ha?

Q. I say, when you are putting these hooks in these bands on these bales you put them in one way to pull out or to drag it?

A. To drag it; that is right. If you want to pull it from the back you drag it.

(316) Q. That is right; then you change the position of the hooks to take it out; is that right?

A. Yes.

Q. And that is the right way to do it?

A. That is the way we do it.

Q. You don't know whether anyone changed the position of the hooks on this particular bale or not, do you?

A. No, it wasn't changed.

Q. It wasn't changed?

A. No; it wasn't changed.

* * *

(317) Q. Did anyone from Atlantic & Gulf Stevedoring Company tell you, or did you ever learn anywhere that there are various positions on these bands where you can hook, place the hooks, to get a greater strength out of the steel?

A. No. The second band, that is where we always learn how to hook them at.

Q. The second band?

A. Second band from the end. That is the onliest band I know of.

Q. If you place those hooks so they twist that metal that will weaken it, won't it?

A. It can't twist it when you set them in there and they come up like that. They always set flat; you can't twist them.

Q. They always sit flat?

A. Yes, you can't twist them.

Q. You didn't see these with the weight on them, did you, because you were back under the overhang of the deck?

A. I see them when they went out the hold, but I didn't see it when it fell, because I was under the wing.

Q. Could you tell the position of those bands, how it rode (318) on each of the six hooks?

A. How they ride? They ride sometimes like this, and then sometimes one will twist around sometimes like that.

Q. But you can't help one twisting around?

A. But you can't help that; that is the way they bring them.

Q. Are you testifying one twisted around that time?

A. No, I can't say that; I was back under the hatch. I can't say nothing about one twisted around that time more than any other time.

• • •

Q. You told us that you saw, after this bale fell down —that you saw the ship's mate or the ship's officer looking down in.

A. That is when we was putting the man on the tray. That is what I am talking about.

• • •

(319) Q. As a matter of fact, do you know whether or not the ship's officers had been coming back and forth that day before this accident? Had you seen any of them?

A. I seen one when we first went down in there, come back.

Q. All right.

A. Then I seen one when Leighton got hurt; I seen one then.

Q. Is that the only time?

A. That is the onliest time I seen him.

Q. All right; let me ask you this. This accident happened about four o'clock in the afternoon; is that correct?

A. Yes, sir, as far as I can remember.

Q. And it has been testified, and you seem to agree, that work started on these bales about one o'clock.

• • •

RE-DIRECT EXAMINATION

By Mr. Borowsky:

(324) Q. One thing that puzzled me about the expression you used, you used the word or the sentence, "Sometimes when these bales go out they are twisted." Now, do you

mean they are twisted with respect to bands or with the ropes that hold the bales?

A. No, with the ropes.

• • •

Q. All right, what do you mean by that, Mr. Jinnifer?

A. Hold the top of the rope up.

(325) Now, see, you got some more rings, and all that goes around. That is what I am talking about twisting.

Q. You mean—

A. The ropes.

Q. Come down and point out to us what you mean.

A. (The witness complies)

Q. Turn around and face the jury, please, so your back is not toward them.

A. (Demonstrating) See, you have two bales on this. You put two on here and a bale on here, then when you pull it up sometimes this bale will come around like that—like that one there. That is twisted.

Q. That is what you meant when you answered Mr. Byrne's question?

A. Yes.

• • •

RE-CROSS-EXAMINATION

By Mr. Byrne:

Q. Mr. Jinnifer, stay right.

If I can use photographs and stand so the members of the jury can see, what you mean is that one may swing around like that?

A. Yes, like that.

Q. Or it may swing from here and go around on the other side? (326) You have them arranged three in a row, and you say mostly it is like that. Now, how do they twist?

A. Sometimes one will come like this.

Q. I see. Sometimes one of the ends will come around so that it is opposite the other two?

A. Yes, but they will still go up.

Q. Now, Mr. Jinnifer, just two questions: When they twist like that, what does that do to the band?

A. It don't do nothing to the band.

Q. You don't think it twists it?

A. No, you don't twist the band.

Q. I see; it doesn't put any extra twisting pressure on it?

A. No, it don't put no pressure; all this go right around.

Q. And don't you think if you put a hook in like that, as I am putting it in, and the lifting force straightens that hook up, that that puts a twisting motion on that band?

A. No, it don't put no twisting motion on the band.

Q. It does not?

A. The band sits right down in there.

• • •

(327) Q. And when you jerk those bales out in that position, using the hooks in the side of the bale, is that when you say you must rehook it on the flat side?

A. That is right.

• • •

(456) Mr. Borowsky: If the Court please, at this time I should like to introduce in evidence several admissions in the answers to interrogatories.

Interrogatory No. 16: "State whether the stowage of the bales of burlap in No. 1 hold was supervised by any of the ship's personnel, and, if yes, state their name, address and job classification and the nature of their supervision."

The corresponding answer: "The defendant is not able to fully understand the 16th interrogatory. It therefore cannot answer it as it is asked. Bales of bur-

lap are rectangular in shape and relatively even in size. It is desirable that the longshoremen shall stow the bales close together and there was general supervision looking toward assuring that the stevedores stow the bales evenly and (457) close together by the chief, second and third officers of the ship. No dunnage is required other than such as may be necessary to fill a space along the ship's side.

"Donald Quinn, St. Hilary's Drive, Deganwy, North Wales, Chief Officer;

"Robert Stenhouse, 7 Faber Street, South Wich, Sunderland, Second Officer;

"S. M. Carr, 17 Henley Street, Middlebrough, Third Officer."

I should like to introduce Interrogatory No. 46 and the corresponding answer.

* * *

Mr. Borowsky: The interrogatory reads as follows, Your Honor: "Within two years prior to July 1, 1955, state the number of times and the identity of the vessels (including the dates) when bales of burlap were discharged in the Port of Philadelphia from vessels under your operation, ownership or control."

The corresponding answer is as follows:

"Neither defendant is able to fully answer the 46th Interrogatory as put. Neither is able to state when (458) bales of burlap were discharged in the Port of Philadelphia from vessels with which one or the other of these defendants was connected, but the following schedule shows the names of the vessels and their dates of arrival and departure from the Port of Philadelphia during the period referred to in the 46th Interrogatory:

Vessel	Arrival	Departure
'City of Birmingham'	March 27, 1955	March 29, 1955
'City of Bristol'	July 21, 1953	July 22, 1953
	December 12, 1953	December 21, 1953
	October 1, 1954	October 1, 1954
	February 17, 1955	February 18, 1954
'City of Calcutta'	April 20, 1954	April 23, 1954
	September 18, 1954	September 21, 1954
	January 27, 1955	January 29, 1955
	July 1, 1955	July 7, 1955
'City of Durham'	January 4, 1954	January 6, 1954
	June 10, 1954	June 11, 1954
	October 27, 1954	October 27, 1954
'City of Karachi'	January 13, 1955	January 16, 1955
'City of Oxford'	July 10, 1953	July 16, 1953
'City of St. Albans'	October 13, 1954	October 14, 1954."

• • •

(462) Mr. Borowsky: If the Court please, at this (463) time I should like to read into evidence portions of the deposition of the chief mate, Donald Quinn, taking at the instance of the defendant Ellerman Lines on November 6, 1957.

• • •

"Q. Now, Mr. Quinn, did you at any time serve on board the City of Calcutta?

"A. Yes.

"Q. Were you on board the City of Calcutta when she was at Philadelphia approximately about July 1, 1955?

"A. Yes.

"Q. And what was your position on the ship?

"A. Chief officer."

• • •

(464) "Q. Can you refresh your recollection from that logbook and tell us when the shipped docked on July 1, sir?

"A. 12:21.

"Q. Now, thereafter, Mr. Quinn, did unloading operations start?

"A. Yes, it started at one o'clock."

• • •

(465) "Q. Now, with whom did you deal in connection with the unloading operation?

"A. I don't know his name, but a representative of the Atlantic & Gulf Stevedoring Company approached me and asked where the cargo was, pertaining to the discharging of the ship.

"Q. And can you give us any description at all, anything (466) identifying this individual?

"A. Well, he wasn't an ordinary workman, he was obviously someone with a bit of authority.

"Q. And what happened after that?

"A. We started discharging.

"Q. From what holds?

"A. 1, 3, 4 and 6."

• • •

"Q. Now, Mr. Quinn, will you give us a little more detail as to the way in which the gunnies which were in No. 1 hold were discharged in Philadelphia on the first of July 1955. Start from the very beginning when they are in stow.

"A. When the hatches are first opened, the bales are in stow, and they start hooking these hooks in to the bands that go around the bales. Then they heave upon the winch and all the bales come together and out they go.

"Q. Now, when you say they are in stow, Mr. Quinn, will you describe just how they are, remembering that your answer will have to paint a word picture for a Court and a jury, who have not had the benefit of seeing this operation.

"A. Well, you all know how you would see the hold of a ship as a big compartment, and all the bales

are laid down (467) in rotation, in rows, across, and then there are rows on top.

"Q. Are they tightly packed or loosely packed?

"A. Quite tightly packed.

"Q. Now, how many tiers high were they in the City of Calcutta, if you know, or can you give us an approximation?

"A. Well, it would be about four or five high. Four, I think.

• • •

This is cross-examination (468) with questions by Mr. Borowsky:

• • •

"Q. And you were carrying on the occasion that reference has been made to, namely July 1, 1955, a cargo consisting of bales of wool, and bales of gunnies, is that correct?

"A. That's correct."

• • •

"Q. Where had you picked up the bales of gunnies?

"A. Calcutta.

"Q. And how about the bales of wool?

"A. If my memory serves me right, they were from Calcutta, too.

(469) "Q. Would you describe to us the difference between the bales of gunnies and the bales of wool?

"A. They are a different shape and the gunnies are much heavier.

• • •

"Q. What inspection did you or any of the officers make of the cargo at that place?

"A. We just saw that it was stowed correctly.

"Q. Did you examine the cargo itself prior to its (470) stowage?

"A. In a general way, you can't examine every bale that goes in when there are a few thousand of them.

"Q. Who was in charge of the loading of the cargo in that port?

"A. I was.

"Q. And who assisted you at that time?

"A. The second and third officers.

"Q. Now, who was in charge of the unloading of the cargo in Philadelphia?

"A. Well, it wasn't a question of there being someone in charge of unloading, there is nothing to supervise. I am only in charge of the stowage of the cargo.

• • •

(475) "Q. First of all, do you feel you have any authority to stop (476) that operation?

"A. If you knew a person was going to get hurt you would try to stop it somehow, but if you don't know, you can't. You might see a man crossing the road. . . .

"Q. If you knew a man might be hurt in this operation you had the authority to stop the operation, did you not?

"A. No, I did not. I could only advise. As I mentioned in an earlier statement, I told him that one of his men might get hurt and he said it was their responsibility, and in any case they were running clear, they knew the danger of it.

"Q. Mr. Quinn, please answer me this question. Did you attempt to direct the person whom you have identified as the one in authority of the stevedores, not to do the work in this manner?

"A. I suggested to him he should not do it that way.

"Q. Did you direct him not to do it?

"A. I can't.

"Q. Did you attempt to direct him not to do it?

"A. What do you mean, by using force or something?

"Q. You knew that if you gave him an order to do, which he failed to carry out, you could shut off the power, didn't you?

"A. If it would be danger to the ship, yes.

"Q. In other words, your criterion as to the authority that you had, would be to stop an unsafe operation if it endangered (477) the cargo of the ship, but if it endangered the personnel handling the cargo you had no authority to stop it? Is that what you are telling us?

"A. As far as the ship is concerned, that's all I am responsible for.

"Q. If somebody gets hurt doing the ship's work, then you feel you have no responsibility toward him, is that correct?

• • •

"A. I mean, it doesn't matter. In that case you would never discharge a ship, there is always a certain element of danger in it.

• • •

(478) "Q. Mr. Quinn, how many times have you been in the Port of Philadelphia with a vessel of the Ellerman Steamship Lines bringing in a cargo of gunnies?

"A. A dozen, I suppose.

"Q. And who were the stevedores that discharged the cargo on those occasions, those dozen occasions?

"A. They were clerks [Clarks] in New York as far as I know. I don't know just who they were, but it wasn't Atlantic and Gulf.

"Q. With respect to the discharge of the cargo in New York, the gunnies, weren't they also discharged by means of hooks?

"A. Yes.

"Q. And isn't it a fact that when the cargo was discharged in Philadelphia on previous occasions, it was done in the same manner as it was done on this day?

"A. Yes.

"Q. So that when that cargo was put aboard the vessel in India, you knew or had a right to know, or believe, it would be discharged by means of hooks in Philadelphia, is that correct?

"A. I expected it would be discharged by hooks.

• • •

(479) "Q. Did you take note of the manner in which the cargo was being discharged during that duration of three or four hours?

"A. Yes, they were going very quickly.

"Q. And all of the discharge was being done in the same manner, is that correct?

"A. Yes.

"Q. By means of the hooks?

"A. Yes.

• • •

(490) "Q. Now, isn't the method of discharging gunnies in the same general category as the discharge of cotton, wool and cork bales?

• • •

(491) "Q. From your experience, sir.

"A. I don't understand the question.

"Q. From your experience, aren't the discharge methods used to hoist cotton, wool, cork, and gunnies in the same class?

"Mr. Byrne: Where?

"The Witness: In Philadelphia, do you mean?

"By Mr. Borowsky:

"Q. In Philadelphia, New York, or anywhere in Great Britain.

"A. I have only been to a couple of ports; I haven't seen gunnies discharged in Britain. When I am in Britain I am home on leave, and then I rejoin the ship when she is ready for sea again. But in America, yes, it's the general practice.

"Q. Isn't it a fact, sir, where there is working space where the men can get into the wings, while the bales are being hoisted out of the hold, that it is customary and perfectly all right to use hooks in the bands or fastenings of bales of cotton, wool, or gunnies?

"A. It's done.

• • •

(492) "The Witness: It's done but I don't consider it safe. However, I am not a stevedore.

• • •

"Q. Did you examine the bands that broke on this particular occasion?

"A. No.

• • •

(494) "Q. The quantity of bales being removed, however, did not tax the facilities in removing them, that is, the winches or the booms or anything of that kind?

"A. Obviously not, because there was no trouble with them.

"Q. If you thought that there would be any overloading, you would have called that to the attention of the stevedores, is that correct?

"A. Yes.

• • •

"Q. Do you know how the cargo was discharged after the (495) accident?

"A. The same way as before."

• • •

"Q. Now, with whom did you deal in connection with the unloading operation?

"A. I don't know his name, but a representative of the Atlantic and Gulf Stevedoring Company approached me and asked where the cargo was, pertaining to the discharging of the ship.

"Q. And can you give us any description at all, anything identifying this individual?

"A. Well, he wasn't an ordinary workman, he was obviously someone with a bit of authority.

(496) "Q. And what happened after that?

"A. We started discharging.

"Q. From what holds?

"A. 1, 3, 5, and 6.

"Q. Now, at any time after discharging commenced, did you have any conversation with this individual whom you have identified as the one with whom you had the conversation?

"A. I can remember talking to him in the early afternoon when we discharged No. 3 hatch, they were discharging some bales of wool and the bands were breaking, and the one sling landed on the quay.

"Q. Now, what method was being used to discharge the bales to which you have just referred?

"A. They had hooks on a length of line attached to a ring, and they were putting the hooks underneath the bands with which the bales were bound.

* * *

(497) "Q. Now, you say, Mr. Quinn, you had a discussion with the person whom you took to be a representative of Atlantic and Gulf Stevedores?

"A. Yes.

"Q. At what time of the day did you have this discussion?

"A. Well, I can't remember the time exactly, around about two o'clock, I should say.

"Q. What did it pertain to; in other words, what was the discussion about?

"A. I said it was a dangerous way of discharging and he said it was the custom of the port.

"Q. Was that the end of the conversation?

"A. No. We had quite a discussion, and he said it was the custom of the port, and I explained how they loaded the stuff in India, and he quite agreed and he said that if they had to do that, they would lose money on the contract.

(498) "Q. Now, you said that you explained how it was loaded in India. Will you tell us what you explained to him?

"A. Yes. Well, in India, they get wire slings and put them around the bales so that each individual bale has a wire around it, and as they hold it tight, the wire tightens around it."

• • •

Mr. Byrne:

"Q. At any time did you have any other conversation with (499) this gentleman whom you have referred to, during the afternoon?

"A. Well, I forget; I may have spoken to him about some trivial things but nothing important.

"Q. Now, at any time did you receive information that an accident had occurred in the No. 1 hold of the City of Calcutta?

"A. Could I take that back?

"Q. Your preceding answer?

"A. Yes.

"Q. Certainly.

"A. I did speak to him after this episode of the wool, and I went and told him that I thought he was discharging from No. 1 far too quickly and dangerously.

"Q. What was his answer?

"A. I got the same answer.

"Q. What was that?

"A. That was—he answered that he did it that way to expedite the discharge, and that the men knew, the men wouldn't get hurt because as soon as the bales started to leave the hatch, go up, all the men run for shelter underneath the decks. So that under the ordinary circumstances, if the bale did fall, they would be quite clear.

• • •

(500) "Q. Now, at any time during the day, was it reported to you that an accident had occurred in No. 1 hold?

"A. Yes, just after four o'clock. The third officer came and told me there had been an accident in No. 1 hold.

"Q. And where were you at the time?

"A. I was in my room.

• • •

(501) "Q. Mr. Quinn, you referred to a conversation which you had with an individual whom you identified. And you have said, if I recall your testimony, that you told him that the method of discharge was in your judgment, dangerous?

"A. Yes.

"Q. Will you tell us why you said that?

"A. Well, for the simple reason the bales were falling down and were liable to hurt anybody who was underneath.

"Q. Now, why were they falling down?

"A. The bands were breaking.

"Q. Now, what are these bands that you have described?

"A. The bands that are placed around the cargo to compress it, to take a smaller place.

"Q. And can you describe these bands for us?

"A. They are just metal bands that go around the cargo, and they are in a press, and when the presses have got the bales compressed, these bands are tight-

ened up with a kind of patent fastener and it holds the bales compressed.

"Q. Mr. Quinn, can you tell us approximately, either give (502) us a dimension or indicate the approximate width of the bands that you are referring to.

"A. Well, I should say about three-quarters of an inch—is it."

The witness indicated something with his finger, and we got a ruler and I think we decided that it was about one inch; is that right, gentlemen?

Mr. Borowsky: Yes, sir.

• • •

"Q. Mr. Quinn, let me ask you this: You had, was it one or two conversations with this gentleman before the accident happened?

"A. Two that I can remember quite well.

"Q. And at which time the advisability of using this method of discharge was discussed?

"A. Yes.

"Q. Did you have any conversation with this same man following the injury to the longshoreman in No. 1 hold?

"A. I did, and I was talking to him afterward."

• • •

(503) "The Witness: And I expressed amazement that he was carrying on the same of discharging the cargo after the accident."

"By Mr. Byrne:

"Q. Was that the end of the conversation or was there anything else to it?"

• • •

"A. I should say that was the end.

"Q. Now, this individual on the day that this occurred, when did you first see him?

"A. When he first came on board about one o'clock it would be.

"Q. And where did you see him?

"A. I should say it was in the starboard alleyway outside, (504) in the starboard alleyway.

• • •

"Q. What, if anything, did you and this man do after you first met?

"A. Well, he came and introduced himself and said who he was.

"Q. What did he say?

"A. I couldn't say.

"Q. He gave you a name?

"A. He gave me his name.

"Q. I see. Did he give you any other identifying information which led you to conclude he was from Atlantic and Gulf Stevedores?

"A. Yes, he spoke as though he knew the supervisor in New York. He called him by his first name—Dick Coffee.

"Q. Dick Coffee?

"A. Yes, he was the supervisor in New York and he seemed to know him quite well.

"Q. And did he and you have any discussions relative to the work that was to be done on your ship?

(505) "A. Just how many gangs they were bringing on board, how many hatches they were going to work and when they expected to finish.

"Q. You say, 'how many gangs they were bringing on board.' Who do you mean?

"A. Atlantic and Gulf Stevedores.

"Q. And how many hatches who was going to work?

"A. Atlantic and Gulf, that they were going to work.

"Q. Did he give you any estimate as to the length of time that the unloading operation was expected to take?

"A. Yes, he told me it would be finished the next morning.

"Q. And did you see him in and about the ship after that?

"A. Yes. Well, we finished working—what time would it be—in the evening, but I left the ship about eight o'clock, and I didn't get back until Monday morning.

"Q. Well, what I meant was, did you see this man doing anything about on the ship in the afternoon, between the time that you first saw him and the time you left the ship?

"A. He was walking about, speaking to the different hatch men, and acting as a ship's supervisor would act. He wasn't in the one hatch all the time, he was going about the ship.

"Q. What do you mean by a ship supervisor? You mean someone employed by Ellerman Line?

"A. He was in charge of the stevedores.

(506) "Q. Can you describe the way he was dressed as compared to the other workmen?

"A. Well, he was better dressed than the other workmen.

• • •

"Q. Now, Mr. Quinn, you have told us that you had a discussion with this individual relative to the method by which these bales of gunnies and bales of wool were being discharged, the method being as I understand it, that hooks were slipped under the bands which kept the bales compressed.

"A. Correct.

"Q. Is that correct?

"A. That's right.

"Q. No, if you did not believe that was the proper method, why didn't you stop him doing it that way?

"A. He was doing no harm to the ship, or the cargo, so I couldn't stop him very well.

"Q. You say you couldn't stop him. What is the extent of your authority in that regard?

"A. I am only responsible for the safety of the ship and the cargo.

"Q. You say he was not damaging the ship. Just tell me what you mean by that.

(507) "A. Had he been discharging steel and dropping it, then I could have said something, that it might damage the ship, but a bale of gunney would not hurt the ship.

"Q. And what is the extent of your authority over an independent stevedoring contractor?

"A. I have got no real authority over him at all.

"Q. Well, you mentioned a moment ago about discharging steel.

"A. In that case, if he refused to stop, the only thing I could do is to turn the power off the deck. That's the only authority I've got, the steam.

• • •

"Q. What is, shall I call it, the source of your authority to interfere in a stevedoring operation? In other words, under what circumstances have you the power—

"A. Well, the only way I can stop stevedores working is by turning the power off the winches.

• • •

(509) "Q. Did I understand you, Mr. Quinn, to say that this was the first unloading operation of gunnies that was performed by Atlantic and Gulf, to your knowledge?

"A. No, when I was Chief Officer.

"Q. While you were Chief Officer?

"A. I hadn't been to Philadelphia for about three years and in the meantime the stevedores had been changed and I hadn't met them before.

• • •

(510) "Q. All right. You told us you recalled about a dozen or so occasions when gunnies were being unloaded, is that correct?

"A. Yes.

"Q. Prior to this time?

"A. Yes.

"Q. And on those dozen or so occasions, what method was used for discharging this same type of cargo?

"A. The same way as what was done this time.

"Q. And were these occasions here in Philadelphia exclusively, or were you referring to also New York and other eastern ports?

"A. All eastern ports.

"Q. And can you tell us, Mr. Quinn, whether that is the only method of discharging this type of cargo with which you were familiar, either in Philadelphia, New York, or the eastern ports of this country?

"A. Yes, that's about the only method I have seen them use.

• • •

(511) "Q. Do you recall you had seen him on any other prior occasion until that occasion?

"A. I hadn't seen him before.

"Q. Have you seen him since the occasion?

"A. I have not; I don't think I have been to Philadelphia since.

• • •

(513) "Q. Mr. Quinn, when you first say you had this conversation with this man that you have described, that conversation stemmed from the fact that you had seen wool bales falling from these hooks?

"A. Yes.

(514) "Q. And can you tell us whether that was caused by the bands pulling off those bales or from the bands breaking.

"A. I would say the bands obviously broke.

"Q. You say 'obviously.' Are you sure that's what was happening?

"A. Not in that particular case, but I have seen bands broken and I have seen them pulling out as well. When you said broke, I thought you meant came apart. They did come apart; whether they were the fastenings or not, I don't know.

"Q. Thinking back, the thing that you say more or less caused you to call this to his attention, do you actually recall any of those wool bales falling because of any of the bands breaking?

"A. I never examined the bands.

"Q. Well, then, would it be fair to say you don't have any recollection that any of those wool bales bands actually broke?

"A. I don't know whether they broke or came apart. I couldn't tell you that.

"Q. Well, in either case, what I am trying to find out is, did the bands pull off from the bale or did the bands separate?

"A. They separated.

(515) "Q. In other words, when you saw them, they were not in their circular form, they were not joined as a circuit?

"A. The band was loose.

"Q. I see. Now, tell us, Mr. Quinn, whether any time prior to this accident when you were advised and came on the scene, whether you have any recollection of any of the gunny bands pulling apart or breaking in the gunny unloading operations.

Mr. Byrne: "On July 1?"

Mr. Marshall: "Yes, on July 1.

"A. I have no recollection.

• • •

(516) "Q. Now, you have described a jumble of bales down in this hatch as you looked down to see what had happened after this accident.

"A. Yes.

"Q. And can I paraphrase that and say that it was a pile of bales?

"A. You could call it a pile, yes.

"Q. And were they in a sense just sort of thrown together or were they piled neatly, or just how would you describe it?

"A. Well, if you get a half dozen boxes in your hand and drop them on the floor, that's how they looked.

"Q. That?

"A. If you got square boxes or anything, and dropped them, they would not stand straight, would they?

• • •

(517) "Q. As a matter of fact, can you tell us, Mr. Quinn, whether or not it would be impossible for two, three or four or five men to get ahold of one of those bales, with their hands, and pull it from its position?

"A. Well, they are stacked by four or five men in India.

"Q. Stacked in position with the aid of lifting equipment?

"A. No, they are moved by these people in India.

• • •

(518) "Q. Do you recall, Mr. Quinn, whether or not you saw the band or bands that were involved in the lift of the bale (519) which fell?

"A. No.

"Q. You have no recollection of seeing the band or bands so that you would not know, would you, whether the band broke or whether it pulled off the bale or just what happened to it?

"A. I have only the third officer's word, who was standing by when the band broke.

• • •

"By Mr. Byrne:

"Q. Mr. Quinn, are you an expert stevedore?

"A. No.

"Q. What is your experience, if any, with stevedoring?

"A. Only what I have observed in the last 20 years.

"Q. You have never actually done any yourself?

"A. No."

• • •

(520) "Q. Mr. Marshall asked you the way these bales were loaded in India, and you used the term, 'a wire sling.' Could you sketch for us the method—will you sketch for us what you meant, just how that is done.

"A. That's the eye, and that's the wire. And there is another eye here, and the hook is on this part (indicating on sketch).

• • •

(522) "Q. Mr. Quinn, as I understand it, in India the bales have a sling around each unit bale, each single bale, is that correct?

"A. Yes.

"Q. Are they lifted or are they hoisted from the pier on to the ship one at a time, or are there several of these bales attached to a common ring or hook?

"A. Two at a time.

"Q. So there are two slings that come in, that are held together by some connecting device to the cargo hook, is that correct?

"A. Yes."

• • •

(523) Mr. Marshall: All right, then over on Page 61 about Line 5. I am questioning Mr. Quinn:

"Q. Did you have any specific criticism directed to him as to the method of using hooks in the bands, to raise these bales?

"A. I just told him it wasn't safe. I told him how they loaded it in India, and he said he couldn't do it any other way. I said, 'you are doing it far too quickly.'

• • •

"Q. Can you tell us, Mr. Quinn, how the bands are placed into the ship, in the loading operation in Calcutta when these were loaded, what device or method was used to lift them and put them into the ship?

"A. Wire slings.

(524) "Q. By wire slings you mean sort of a net affair?

"A. No, a wire with a loop in each end.

• • •

"Q. Yes. But in any event, it is not done by means of the use of these bale bands. Do I understand you on that?

"A. Yes.

"Q. Now, had you ever seen that kind of a system used for unloading any place in the United States.

"A. No. I might point out my chief query for querying in the first place, was that it wasn't the way they were doing it, it was the fact that they were going too quickly. They were in too much of a hurry.

• • •

(525) "Q. Did you suggest to him any alternative method of unloading this type of gunny aside from the hooks in the bands?

"A. I suggested it would be much safer if they did it the same way as they loaded it. He said it would be far too slow.

• • •

(527) Mr. Byrne: If Your Honor please, I move to dismiss the plantiff's case at this time, and I point out to the Court that there is no evidence of any defect in any ship's equipment, and there is no evidence of any de-

fect in any of these hands that broke. There was an attempt to prove that, but that was ruled out, so we have here a case of a hale falling; that is all we have.

The only issue that I can possibly see that Mr. Borowsky can argue is that the ship owed a duty to supervise the method of work adopted by the stevedoring contractor, and I submit that that is clearly answered by the decision of the Court of Appeals for this circuit in Crumady v. Messer. I think that the effect of that case and other holdings—I am not leaning entirely on that case—that seems to clearly cover the point that while the remedies of these injured longshoremen are very broad in scope, and that a great many things have been given the name of unseaworthiness, there is no evidence of unseaworthiness here, and there is no responsibility—I don't want to say it quite that way—there is no liability upon the part of the ship- (888) owner who, having contracted with the plaintiff's employer, simply does not supervise the work which these men are doing. In other words, we are responsible for our ship; we are responsible for our ship; we are responsible for our equipment; we are not, however, responsible for the methods of work adopted by the plaintiff's employer which may cause him injury, and that is what we have here, I submit, on this evidence.

Now, another point. What theory are we going to submit this case on? In other words, what is the issue for the jury?

The jury, as I see it, has to resolve disputed questions of fact, and I say at this point, giving the plaintiff the benefit of every piece of evidence and every favorable inference that could be drawn from it, there is nothing here for this jury to pass upon; there is nothing that would support a finding of unseaworthiness; and if the Court of Appeals means what it says in the Crumady case, that the shipowner is not responsible

for the method of work adopted, or Feinman v. Bull Line, Crumady and Messer—there is a whole line of them—if the shipowner is not responsible for a method of work adopted by the stevedoring company, then there is nothing for this jury to pass upon.

• • •

(532) I deny the defendants' motion.

• • •

(533) PAUL J. KEELER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Byrne:

Q. Mr. Keeler; what is your business?

A. I am a marine consultant.

Q. Are you connected with any firm?

A. I am self-employed.

• • •

Q. Have you had any experience as a stevedore?

A. Yes, I have.

Q. Will you tell the Court and jury what experience you have had as a stevedore.

A. My total experience in the marine field?

Q. As it pertains to stevedoring operations, please.

A. I left the sea in 1933. I was brought ashore on a training program by a steamship company and I was at that time working (534) as a longshoreman, a winch driver, a hatch foreman, and assistant superintendent, and superintendent. I was a checker and a clerk at one time. Then I became superintendent of Pier 2 North River, and in 1936—or in 1936 I was made superintendent; in 1938 I was made traveling stevedoring supervisor for the steamship company, and in 1941 I was made assistant to the general manager of operations, and on April 1 of 1945 I resigned that position and I went as marine superintendent of the John W. McGrath Corporation.

Q. Is that a stevedoring firm?

A. Which was one of the largest stevedoring firms in the world. In May of 1953 I was made vice-president in charge of operations of the company, and I resigned in October of 1954 to form my own company.

• • •

(535) Q. Mr. Keeler, are you familiar with the operation of discharging baled cargo from steamships?

(536) A. Yes, I am.

• • •

Q. Now, Mr. Keeler, in using hooks such as that to discharge cargo is there a right way and is there a wrong way to use those hooks?

A. Yes, there is.

Q. Now, what is the right way, Mr. Keeler?

A. Well, the right way was demonstrated here by the gentleman who said that both hooks should face each other.

Q. Now, where you have bales with four bands, which weigh between 1000 and 1500 pounds, Mr. Keeler, such as are illustrated by this photograph P-4, are there any particular bands which should be used?

A. The bands that should be used are the two outside bands.

• • •

Q. You said, "the two outside bands." Will you tell the jury why.

A. Well, frequently these bands are compressed—not frequently, I mean they are always compressed—but frequently they are compressed to a much greater degree than at other times, (537) and it is not always an easy manual job of taking the point of the hook and putting it under the band. In fact, in many instances you enter the point of the hook under the band and take the other hook and hammer it on the back, if it is a tight bale, to get it under the bale. Now, the reason you start the hooks together so they form a bridle affair on the little spliced bridle you see on each leg.

• • •

(546) Q. Now, is there any point on the circumference of the steel band around the bales such as shown on the photograph there which makes the most efficient point for lifting the bale by means of a hook inserted under the band.

• • •

The Witness: Yes, there is.

By Mr. Byrne:

Q. Where is it?

(547) A. The point would be any point on the bands which involves this corner of the bale.

• • •

The Witness: Any of the four corners or four sides of the bale, under that corner—either here, here, here or here; there, there, under the corners.

• • •

Mr. Borowsky: What are you pointing out?

The Witness: I am pointing out the point at the corner of the bale where the band goes around the corner and forms a right angle.

Mr. Borowsky: And what is that?

The Witness: The corner of the strap.

Mr. Borowsky: Yes, I know; but you say that is the most efficient—

The Witness: That is the place where the hook (548) would exert the least strain on the wire, or the wire band.

• • •

By Mr. Byrne:

Q. Mr. Keeler, what is the effect when the hook is moved further and further away from the corner of the bale toward the center of the flat surface?

A. That movement has the same result as plucking a piano string in the middle or pulling out a bow and arrow, to expel the arrow, and the further you get in any span

between two points, whether it be a wire or a rubber band or a piece of string, or what it is, you are exerting a greater strain on the material in tension if you pluck it at the furthest part from both supports or both anchorages.

• • •

By Mr. Byrne:

(549) Q. Mr. Keeler, is there a right way and a wrong way to insert these hooks with respect to the distance from or proximity to the buckle?

A. Yes, there is.

• • •

(551) By Mr. Byrne:

Q. The question is, what is it?

A. There is a shearing action that is set up by a hook placed immediately next to a buckle. The buckle is twice as wide as the band. The band has a tendency to tip as the plane in the bottom of the hook is changed. The buckle has a tendency, being wider, to resist that movement of the strap, and the hook, being closely adjacent to the buckle, (552) has the action of a pair of shears on the bands.

• • •

Q. Mr. Keeler, will you illustrate what you mean by that.

A. If the hook is put too close to the buckle it has a tendency—

The Court: Stand around a little, Mr. Keeler. These jurors have to see. Thank you.

The Witness: This buckle and the band are practically sunk into the bale. When you put a hook on it like that, if it comes close to the buckle it has a tendency to turn that buckle just like my hand is doing now. The buckle has a tendency, not the band, and there is a shearing action that is set up right through here.

Now, if you get it where there is no buckle the strap simply from one end to the other just bends up with (553) the hook like that, follows the hook along, but this buckle, being wider, prevents the strap from going with the hook and the hook puts the pressure on that just the same as two blades of a scissors, on the strap.

By Mr. Byrne:

Q. Mr. Keeler, with respect to the type of hook which is used, does it make any difference, the angle at which—

The Court: I cannot hear you, Mr. Byrne.

By Mr. Byrne:

Q. Does it make any difference, the angle at which the short end of the hook is with respect to the long arm of the hook?

A. If it runs at an angle of approximately 45 degrees it would be about right, but the angle could vary, I would say, ten degrees in either direction, either closer or more open.

Q. What is the effect of that angle on the twisting action of the band when it is inserted?

A. It would have more relation to the short legs of the bridle to the main ring.

Q. Will you explain that answer, please?

A. Well, a longer leg on the bridle—

Q. What do you mean by a longer leg on the bridle?

A. The longer leg is the three legs that are spliced into the ring; then there is a double leg that comes down off that.

• • •

(563) By Mr. Byrne:

Q. Will you go ahead and read to Mr. Keeler—I will reframe the question.

Mr. Keeler, are you familiar with the practice in operation as to the right of a mate of a ship to dictate to a stevedore with whom the shipowner has a contract that the

stevedore shall unload as to the method of work which the stevedore uses in discharging cargo from the ship?

A. The mate or the master of a vessel does not dictate to the stevedore the methods or the gear used in loading any vessel.

• • •

(565) PAUL J. KEELER, recalled.

Cross-Examination

• • •

(579) Q. All right, now, when you say that there is a proper way and an improper way, have you ever conducted any experiments with these wires, with these bands?

A. Counsel what kind of experiments?

(580) Q. Either practical or laboratory.

Mr. Byrne: You mean, tested?

The Witness: Well, we have tested broken bands, if that is what you mean.

By Mr. Borowsky:

Q. Yes, you have subjected broken bands to some testing laboratory; is that right?

A. Yes; that is right.

Q. Well, we will hear about that later. Now, how about practically—have you experimented? Have you gone aboard ship and tried these various methods, putting one in the center band, one in the end band, two in the end band, two in the middle band?

A. When I was a longshoreman I did, yes.

Q. All right, did you find that the bands broke no matter where you put them?

A. Under what condition?

Q. Under the conditions of work.

A. Well, the conditions of work vary so greatly I don't know what you have in mind.

Q. I mean, as a practical matter isn't it a fact that when you are trying to get bales out of the hold that are loaded up to the top of the deck above, you have got to yank them out the best way you can, and your force there is almost (581) at a right angle to the bales, and not only do you pull them out, but they drop down and there is a force of momentum added to the force of the pull, and the bands don't break there; isn't that a fact?

A. No, the bands do break.

Q. Well, how often do they break?

A. I would say that ten bales fall in every 500.

Q. I see. Now, those bales that you say fall in every 500, are you talking about the bands breaking from those bales?

A. Yes.

Q. And you are talking about the bands breaking when they are being pulled out of stow, or when they are being lifted up straight out of the hold?

A. When they are being lifted.

Q. When what?

A. When they are being lifted.

Q. What about when they are being pulled out of the stow?

A. Four times as many bands break as that.

* * *

(616) Q. All right, "breaking effect." As a matter of fact, the breaking rate of bands would also be affected by the condition of the winch equipment, wouldn't it; namely, whether or not there was any jerking or sudden stopping?

A. Not so much that as by the winch operator.

Q. All right. Would you then agree that the nature by which the operator operated that winch would have an influence on the number of bands breaking?

A. Yes, I would say that.

Q. The more he jerked it the more likely—I say the more he jerked the load that was being lifted or started,

the more likely there would be a band break; isn't that correct?

A. That is right.

• • •

(617) Q. Now, as a matter of fact you told us that you had had considerable experience with contracts between stevedoring companies and shipping companies; is that correct, Mr. Keeler?

A. That is right.

Q. I want you to tell this jury if you know of any contract in existence between a stevedoring and a shipping company which requires the stevedore to unload bales of burlap by any method other than was used in this case.

• • •

(618) The Witness: The methods used by the stevedore are not included in any contract. The rate is in the contract, but not the method.

• • •

The Witness: I say, the rate that you are going to charge for discharging the contract, and your guarantee that you will discharge their ships when they come in, are in the contract, but not your methods.

By Mr. Marshall:

Q. So that the answer is that you know of no contract which specifically contains a provision dealing with any method of unloading this particular type of cargo, is that correct?

A. That is right.

Q. And if that is the fact isn't it also a fact that you know of no contract which calls for or requires a stevedore to unload this kind of cargo in a method other than what was used in this case?

A. No.

Q. By that you mean you know of no such?

A. No; that is right.

• • •

(641) WILEY RICHARD DOWDY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Byrne:

Q. Mr. Dowdy, what is your occupation?

A. I am assistant manager of Norton-Lilly and Company, steamship agents.

• • •

Q. What connection, if any, did Norton-Lilly have with the steamship "City of Calcutta"?

A. We are the agents for the ship.

Q. In Philadelphia?

A. Yes.

Q. Now, at my request did you produce the records of Norton—Lilly (649) and Company with respect to the arrival of the steamship "City of Calcutta" at Philadelphia on July 1, 1955?

A. Yes, I have.

Q. Are there any records there of examinations or surveys, or whatever you would call them, Mr. Dowdy, of the condition of the contents of the ship's holds—by that I mean the cargo that was carried?

A. Yes, I have such a report.

Q. Now, is that examination or survey something that is done or was done particularly on this occasion, or is that a routine thing you have done at all times?

A. It is done on all of our ships.

Q. In other words, is that a report that comes into your file by someone who has been down and actually looked at this cargo, or what is it?

A. It is a report made by our surveyor, prescribed by our surveyor.

Q. In the usual course of business what happens to that report? Do you have a copy of it?

A. Oh, yes, we have a copy in our office as well as at the pier.

Q. And, Mr. Dowdy, in the case of the "City of Calcutta" did that report make any reference to the bands on the bales of the cargo that was on that ship?

• • •

(643) Q. Mr. Dowdy, while we are looking at that can you answer one question which has been suggested by Mr. Marshall? When is this examination made? Is it before, during or after, or is it a continuous thing?

A. You mean the actual operation of surveying the ship?

Q. Yes.

A. During the operation—

Q. During—

A. — and after.

• • •

Mr. Byrne: I am only going to prove a record made in the usual course of business, sir; that is all.

• • •

(644) Q. Are these surveyors employees of Norton-Lilly?

A. They are engaged to perform the service.

Q. Are they engaged on a job basis or are they all-year-round employees of Norton Lilly?

A. They are not employees of Norton-Lilly.

Q. They are not employees of Norton-Lilly?

A. No, they are not; they are independent surveyors.

• • •

(645) By Mr. Marshall:

• • •

Q. Well, this is signed by Bernard Porries, Frank R. Gunn Company, Inc. Are you familiar with them?

A. He would be the surveyor.

• • •

Mr. Marshall: I would have to object to it at this stage, if Your Honor please.

Mr. Borowsky: I don't know whether there is anything in there of any consequence.

The Court: Objection overruled. I think it is a business record.

(646) Q. Does the report of survey to which reference has been made refer only to the particular cargo in one hold or consigned to one consignee, or did it cover the whole ship?

A. It covered the whole ship.

Q. In there was there any report made with respect to the bands binding bales of burlap?

A. There was no specific mention of bands for any one particular hatch. In the survey, or the summary, of the entire ship the following statement was made by Frank R. Gunn.

Mr. Marshall: I will object to this, Your Honor.

• • •

(651) The Court: I think that is right. I think there ought to be further identification here of the hold. I think it does make a difference. It may well be that it is all burlap, but we have spent days here describing how it was taken out. These bands may have broken in another hold by virtue of a good many things, maybe jerking, terrific pressure put on them in pulling them out. If they broke in another hold, that doesn't say that they would break in this hold; there are other factors other than the identity of the type of goods, I think, which the jury ought to have opportunity to weigh in order to determine—

• • •

The Court: I am going to sustain objection to this. I don't think it ought to be shown unless there is more complete identification as to the hold.

Mr. Byrne: Well, sir, in view of your Honor's ruling may we nevertheless have it marked?

(652) The Court: Yes, indeed; it will be marked as an exhibit.

(Copy of letter of Norton-Lilly and Company, Philadelphia Office to the New York Office with attached report of Frank R. Gunn Company, Inc., over signature of Bernard Porries, marked Exhibit D-4.)

Mr. Byrne: My offer of this report is objected to and the objection sustained, Judge Ganey?

The Court: On the grounds that I have noted with respect to that particular portion of it, yes. I haven't looked at the rest; I don't know whether there is anything else you want offered.

Mr. Byrne: No, there is nothing else I want.

• • •

A. W. GROSVENOR, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(653) By Mr. Byrne:

Q. What is your occupation?

A. Professor of Metallurgical Engineering, Drexel Institute of Technology, and consulting engineer.

Q. Mr. Grosvenor, what training have you had as an engineer?

A. I am a graduate in metallurgical engineering from Ohio State University and have taken some graduate courses at the University of Pennsylvania in stress analysis.

Q. Mr. Grosvenor, at my request did you examine certain steel straps?

A. I did.

• • •

Q. Mr. Grosvenor, what is the tensile strength of metal? Will you explain that to the Court and jury.

A. The meaning of tensile strength?

Q. Yes, please.

A. It is the load, placed parallel to the length of the object, that a square inch of the material would carry. If

we do not have a square inch of material—for example this band is an inch wide and 1/16 inch long, which is 1/16 square (654) inch—we measure the load that that piece will carry, then divide by the area. In other words, it would be in this case about 16 times what this one band will carry. Or the breaking strength of the piece itself would be simply the load it will carry when supported at one end and pulled on the other end.

Q. You mentioned something parallel to its length in your last answer.

A. Yes.

Q. Will you explain what you mean by that, what difference that makes.

A. Well, material of this sort has no particular strength sideways. The strength of it is realized when the load is parallel to the length—if we hold one end and pull in the direction of length.

Q. Now, will you define to the Court and jury the term "yield strength".

A. The yield strength is measured in a manner similar to tensile strength; that is, a load parallel to the length, but not the maximum load in this case as is tensile strength; it is the load at which the material first begins to deform plastically. That is, it is the largest load that could be placed on the material without having it permanently stretched. When the load is removed or a slightly smaller load is removed the material should return to its original dimensions.

• • •

(656) Q. Is the test you applied recognized in the engineering profession?

A. Yes, it is a standard engineering test specified by the American Society for Testing Materials and in common use throughout the world.

Q. Is the manner in which you made the test accepted in the industry?

A. Yes, it is quite standard.

Q. And what did you find is the tensile strength of the band (657) which you tested?

A. The full width band would carry a load of three thousand seven hundred pounds—thirty-seven hundred pounds.

Q. And did you also test this particular band for yield strength?

A. Yes, I did.

Q. What was that? What was your finding there, sir?

• • •

(656) A. Yes, the yield point—that is at which the plastic deformation began—plastic stretching began—was 3,030 pounds and the breaking strength or maximum load it would carry without breaking is 3,700.

Q. Mr. Grosvenor, while you have that before you, did you do a Rockwell hardness test on that material?

A. Yes, I did.

• • •

(659) Q. What was the result of the Rockwell test on this particular band?

A. 74 to 78.

Q. And what does that indicate, sir, with respect to the—

A. Well, it really is a double check on the tensile test; the harder the material the higher the tensile strength. It is just an extra check on tensile strength, and the two agreed.

• • •

(660) Q. Well, would this be hard?

A. No, this is a reasonably soft material. An automobile fender, for example, would be about 55. The steel in this building would be a little bit stronger than this, a little harder than this material. It would be between an automobile fender and the steel used in this building. I would say you would call it a soft material, a fairly soft material. And it is consistent with the tensile strength.

• • •

(661) By Mr. Byrne:

Q. Doctor, I will ask you to assume—you can hold that—that bales weighing between a thousand and fourteen hundred pounds are stowed in the hold of a ship, that they are removed from the stow where they are pressed closely against each other (662) by means of inserting hooks under the bands, such as you see there; that in the particular bales in which we are interested the bales were not in the square of the hatch; they were variously described as being on the edge of the stow just away from the hatch opening, by another witness, aft on the outboard side—by that the witness meant to indicate that they were a little further away from a direct pull line from the lifting mechanism; that the bales were pulled out of their position, stopped under the tip of the boom which was being used as the lifting force, and thereafter moved by being raised straight up by means of a steam winch. First of all, Mr. Grosvenor, can you tell the Court and jury the various forces which are being exerted upon the bands of steel during the various stages of that operation?

A. I can.

Q. Will you, please?

A. According to the photograph, and your hypothetical question, the hooks are placed under the bands which are tightly stretched around the bale, so that a tensile force is placed upon the bands by such a lift. Tensile force, however,—force—the force of the hoist against the weight of the bale is not simply the weight of the bale; it is many times that, because the force is being applied almost at right angles to the band and not parallel to it. In a tension test or in (663) describing the strength of a band of that sort we apply the load parallel to the band. In this case the band was tightly stretched and the load applied in a direction at right angles to it.

If I might use an analogy—

Q. Yes.

A. If one wanted to lift two heavy suitcases, if he lifted them straight up he could lift fairly heavy suitcases

in that fashion, because the load is being applied directly against gravity. If the suitcases were placed out on two tables, then only very light suitcases could be lifted, or if we attempt to lift the same weight suitcases a great deal of load would be applied. Or another analogy might be a piece of clothesline. A clothesline suspended from the branch of a tree would carry some hundreds of pounds weight, but when stretched tightly between poles it takes only a fraction of that load applied at right angles in order to break it, which is called in mechanics, "mechanical advantage." It comes in the same category as a lever or a screw or an incline plane or any other of the pulley devices, so that when a flexible member such as these bands or rope, or cable, is loaded at right angles to its length and the band or rope kept tightly stretched, the load on the band, the tensile forces in the band are multiplied many times, and the flatter the angle the nearer straight the (664) band remains and the greater the multiplication. If the band were at an angle like a tent and the load applied, or like in the picture, or in the case of a portrait on the wall with two picture wires supporting it, each supports approximately half of it, but if we were to put the picture wire between two screw eyes in a horizontal direction and pull on it we might easily break that wire, and if we do it in that fashion we would have to use a much heavier wire to support the picture. So the force is magnified more and more as the cord or band becomes more nearly at right angles to the load, as it becomes more nearly straight, so that we have a similar situation here with the bands being almost straight and taut, and the load applied at right angles exerts very much a magnification of the tensile forces in the band.

Q. Mr. Grosvenor, did you do any calculations as to the tensile strength—as to the stress applied to the bands such as the one you have or the one which is in evidence in this case, which you have seen?

A. Yes, I made certain calculations depending on the angle of the band. If the band were quite loose so that at

the point where the hook is applied it was tent-like, then the load is not very great. I calculated it in terms of the angle between the band and the horizontal. If the band is up 30 degrees the force is twice as great. As I took angles flatter and flatter the stress rose.

(665) Now, if we were to lift the band or lift the bale by one band, then an angle of 11 degrees would cause a stress in the band equal to the strength. If we lifted it by two bands then, if course, it would cut that load in half, but as the angle was brought down flatter then again the stress would increase until we could break two bands. Now, that is assuming that the force is applied vertically, not from a bridle or sling. It also assumes that there is no twisting of the bands, and it assumes that there is no initial stress in the band from the bale itself.

Q. You said that you assumed that that force was applied vertically and not on an angle such as would be applied by a bridle forming a V.

A. That is right.

Q. What difference does that make, sir?

A. We have exactly the same problem in two places now of the angle of applying the load. You might liken it to pulling a car that is stuck. If you attach a rope to the front axle and have men pulling on the rope, if they pull at right angles to the wheel they exert no force tending to move the car, and you could put any number of men on until you break the rope without doing anything. If, on the other hand, the rope is applied straight ahead then the load on the rope equals what they are able to apply. If we attach a rope at (666) an angle of 30 degrees, 45 degrees, to the direction of the line of the car, then a greater force would have to be applied to the rope to move the car. But incidentally, a means sometimes used to move a car or truck with a rope, and to do it with a very small force, is to tie one end of the rope to the axle of the car, the other end to a tree or a rigid support, stretch the rope as tightly as possible, then instead of pulling on the rope a man

simply gets in the half length of the rope at the mid-point and pulls sideways, which does this to the rope, and an enormous force can be exerted. The only danger is that the rope may break. It takes a very strong rope to stand that.

Of course, if he pulls far enough the mechanical advantage becomes less and less, so he will have to stop and tighten the rope again; but by successive pulls of that sort if the rope is strong enough one man can move a 10-ton truck.

Q. And that is all by a well known mechanical principle, sir?

A. Oh, yes; I think anyone hoisting loads by a bridle or sling knows that the angle of the bridle or sling must be a rather small angle; they must pull nearly vertically. They know they should not spread the ropes or cables or chains out at a flat angle because the force in tension is multiplied (667) many times, and the closer that becomes to the horizontal the greater the stress on the cable or rope.

Q. Would you look at Photograph P-5 which is before you, sir?

A. Yes, sir.

Q. In lifting a bale by raising those hooks, Mr. Grosvenor, do I understand your testimony is that the effect on the band itself is to apply a force greater than the weight of the band?

A. Greater than the weight of the bale.

Q. Greater than the weight of the bale?

A. Yes, many times. Many times greater.

• • •

Q. Will you explain that answer to Mr. Borowsky? What did you mean by "many times"?

A. The fact that the band is stretched taut and the angle of loading is not in line with the length of the band, the more nearly the band is stretched taut the greater the magnification of force. If the band were up at an angle of 30 degrees, tent-wise, the angle between the band and the

horizontal being 30 degrees, the tensile force in the band would be one-half—or, I am sorry, twice—then from that angle as the band is more and more taut and the angle flatter (668) and flatter, the magnification of that force increases at an increasing rate, incidentally, until if you could maintain the band exactly straight the force magnification would be infinite.

Q. Mr. Grosvenor, taking a look at the bales in the photograph, is there any point on those bales where the most efficient use of the band for lifting can be obtained?

A. By "efficient," Mr. Byrne, what do you mean? Do you mean from the stand point of stressing the band?

Q. Yes, least.

A. Well, from the stand point of stress, since at the corner where the band goes around the corner of the bale it already is at an angle, therefore pulling in the direction that is turning the bale up on the corner would put the least stress on the band.

Q. And where would it place the most stress upon the band, sir?

A. To put it in the middle of a flat side would cause the most stress, and since there would be a sling involved—well, you haven't asked that.

Have I answered your question?

Q. Yes; have you answered it?

A. Yes, that the least stress in the band would be if the hooks were placed at the corner of the bale.

(669) Q. And the most stress?

A. In the flat side—in the middle.

Q. In the center of the flat?

Mr. Borowsky: He did not say that, Mr. Byrne; please don't lead him.

By Mr. Byrne:

Q. Does it make any difference?

A. In the flat side it doesn't make too much difference whether it is exactly in the center or not.

Q. Did you at my request prepare any, shall I say, exhibit that will demonstrate the principle, Mr. Grosvenor?

A. Yes, I did.

Q. Would you get it, please.

• • •

The Witness: This is a rather crude illustration, but brings out the point. The piece of two-by-four about 18 inches long would represent the bale. The single piece of music wire stretched around is representative of the band. Now, if the band is put on loosely then applying the weight, (670) applying the load, the hook to lift on this, would allow the band to stretch considerably. If the band is tightened up, which I can do by the turnbuckle, so that it doesn't stretch very much—now I need a bucket of water for the weight.

• • •

(672) Q. In other words, if you tighten that piano wire on the wood, it just might cut into the wood?

A. It would cut in, and I couldn't draw it around the back side. I did not have the advantage of the hydraulic—

I realize in doing this demonstration that sometimes they don't work, but we will take that chance. I have put a tape on the bucket and weighed the water plus the bucket. That is 12 pounds. Philadelphia suburban water weighs about the same. It may not break exactly at that, but if it doesn't I am going to add water until it does. The bucket simply simulates the hoist—

(Wire snaps)

—so that it would break at somewhat less than that load. Now, if I may have a moment to do it—and I don't want to rust the wire—I would like to put another on loosely to show the distinction. It actually—at least, (673) it has in the past and I suppose it will do it again—will support two full buckets. I don't have two full buckets. Could you, Mr. Byrne, distribute the water about evenly between the two?

Two full buckets within an inch of the top of each bucket weigh 40 pounds.

Q. May I ask if you are going to leave the old wire on that was broken, or are you going to remove it?

A. I was going to remove it.

Q. I would like to ask one question for the record before you do. Can you tell us whether or not that broke at the point where you had the hook attached to the wire?

A. Let me see. Theoretically, it should. I don't know whether it did or not. There will be a slight bend in the wire. There is where it came over the edge. If that comes to the middle—I would say approximately, yes.

Mr. Byrne: Will you turn around so the jury can see that?

The Witness: I would say that it broke approximately under the hook.

By Mr. Marshall:

Q. Certainly within an inch of it.

A. I think so. There is bending at that point in this small hook. I am sorry to take time here.

• • •

(674) Q. Mr. Grosvenor, you just said that the jerk adds 50 to a hundred per cent to the load being lifted.

A. Yes.

Q. And is that true of whatever is being lifted, whether it be buckets of water or bales of burlap?

A. That is right.

Q. In other words, sir, are there other forces involved in a lifting operation other than the mere weight to be lifted?

A. Yes, the starting of the load, if done very gradually and brought gradually up to speed and continued then at a smooth (675) pace, would not add to the load. If, however, it started jerkily or at my time speeded up suddenly, or if it swung to one side, it would increase the load.

In addition, while this was a round wire with which I demonstrated, and you can't very well bend it to warp, but in a flat band if the hook lifts to one side and twists the band that put not only an additional force but a tearing action almost like tearing paper.

Q. That is exactly what I was coming to next. Mr. Grosvenor, when a hook is being used somewhat in the way in which I am holding this hook under this band are there other forces other than the mere weight of the object being lifted involved?

A. There can be, yes.

Q. Will you come around over here so you don't obstruct the view of the jury, please.

A. If the weight were applied now as we have it, the main load occurs on the edge of the band toward the point, tending to twist or rotate the band, which produces a tearing action and puts more load on that edge of the band. It does not distribute it uniformly across the band. And the greater that angle the greater the twist. The ideal condition would be for the entire weight—or width—the entire width of the band to support the load and not one edge in this fashion. (Indicating)

(676) Q. Now, again referring to the photograph which is before you, Mr. Grosvenor, Plaintiff's Exhibit 5, is there any other, shall I say, stress factor involved in the bands which are around that bale?

A. Yes, the mere force of holding the bale together is a force, is a stress, or creates a stress.

Q. Now, Mr. Grosvenor, can that be measured? That stress that is exerted simply by holding the bale in place?

A. Oh, it would be possible as a laboratory thing to measure, yes. It would be different just to look at one and calculate it, but it could be measured by putting a gauge on it and measuring, but you could estimate approximately by simply picking up the bale. If the band is stretched quite tightly there will be very little lifting of the band away from the bale. If the bale is tightly banded and a

great deal of stress is in the band, then when the bale is hoisted the band will not lift very far from the bale.

Q. And if we assume, sir, that in the particular instance in which we are interested when the weight was applied the strap or band was so tight that there was very little appreciable movement of the strap away from the bale, could you give the jury any idea as to the tension that would then have been in that band before any weight was applied, simply by reason of the fact that it was holding the bale in compression?

(667) A. You could make a reasonable calculation of it. For example, the one that I mentioned, that if the bale were banded rather loosely and the band lifted up by 11 degrees, then the force in the band would be about equal to the tensile strength. Now, by tightening it you could get some calculation of it; I wouldn't say it would be very exact.

Q. If the band did not go up as high as 11 degrees and was down, let us say, at a very flat angle, would there be a great deal of stress on that band, sir?

A. Yes, the stress on the band increases as the band is tighter and hence lifts away from the bale less.

Q. Now, Mr. Grosvenor, you said that at an angle of 11 degrees, according to your calculation, the weight on a single band being used to lift the bale—in other words, not two hooks but one—if it were 11 degrees the tensile strength simply from the lifting action would be equal to the tensile strength of the metal which you tested?

A. That is right.

Q. In other words, thirty-seven hundred pounds. Did I understand you to say that as that angle became flatter that would increase?

A. That is right. You couldn't, of course, increase it beyond its tensile strength; it would break.

* * *

(678) Q. But based upon your calculations—

A. That is right.

Q. —as you reduce it from let us say 11 degrees to 8½ degrees, how much of an increase would be placed—

A. That would increase it from 3,700 to 4,700.

Q. In other words, an additional 1,000 pounds of stress?

A. That is right; about 20—better than 25 per cent increase.

Q. Are you familiar enough with the practices and the codes of engineering societies, to tell the Court and jury anything about safe working loads of materials such as anything that is being used to lift?

A. Yes, I am.

Q. Now, these codes—who promulgates those?

A. Well, there are a number of them. The American Society of Testing Materials, you might say, is more or less the parent body for all codes concerning the United States.

Q. Are you familiar with the safety factor that is promulgated by the American Society for Testing Materials with respect to, shall I say, lifting gear?

A. Well, for steel cable, for example, a steel cable used for non-moving load—that is a guy wire where the load doesn't change much—would be about four. That means that (679) the cable should be four times, at least four times, the load put upon it. If it is going to be used for hoisting, for a moving load, then the cable should be at least five times. Those are minimums.

Q. They are minimums. Four to one in the case of a stationary load and five to one in the case of a moving load?

A. Five to one in the case of a moving load. On a highly—very highly specialized thing where the utmost care is used at every stage of manufacture, such as aircraft, sometimes the ratio is only about two, but that cannot be used for general purposes.

Q. Are you able to form an opinion, Mr. Grosvenor, as to whether it was a safe practice to attempt to lift bales weighing between 1,000 and 1,400 pounds by inserting two

hooks such as we have here, Plaintiff's Exhibit 1, under two bands such as Plaintiff's Exhibit 7?

A. Yes, I have.

May I ask a question? I notice in the picture here they are lifting two bales simultaneously. Is that—I am not familiar with what is common practice.

Q. Actually, in the particular case we are speaking about three bales were lifted simultaneously.

A. Three bales were lifted simultaneously.

Q. And I can give you a photographic illustration of at (680) least one instance of that.

I show you P-6. Do you have my question in mind, Mr. Grosvenor?

A. Yes, this complicates it somewhat in that by lifting two or three bales at a time they may not at all act independently and the weight or part of the weight of one bale may rest on the other and add to—instead of each one getting its normal quota of weight it may be carrying part of the other.

Q. Will you illustrate what you mean by that, sir? Can you illustrate by looking at that photograph?

A. Yes, the center bale in the photograph could very well rest part of its weight on the two outer bales, or vice versa, so that the strap for one bale carries not only the load of that bale but part of the load from the other one.

• • •

(681) Q. Are you able to express an opinion as to whether or not that is a safe method of doing it?

A. From an engineering standpoint I would say decidedly not safe, because from my own calculations the load on the bands comes too close to the tensile strength under ideal conditions, and such things as bending or twisting of the bands by the hooks, one bale carrying part of the weight of another, non-uniform, non-smooth lifting, a jerk, anything of that sort—of course might all happen simultaneously—in which case the band just isn't strong enough to carry it. I would say at best the safety factor

is about one and a half; it is only about one and one-half times as strong as it need be; not over two at most.

* * *

CROSS-EXAMINATION

* * *

(684) By Mr. Borowsky:

Q. And you have been in court for several days, and you have heard described the method by which these bales of gunnies were discharged, have you not?

A. Yes.

Q. And according to your laboratory tests you would expect quite a number of these bales to break, would you not?

A. I would expect some.

* * *

(686) Q. Now, why do you pick out 11 degrees as opposed to straight up and down? Why do you get away from a direct pull?

A. Well, I think, Mr. Borowsky, you misunderstand the significance of the 11 degrees.

The Court: The 11 degrees is in the band—let me understand it.

The Witness: That is right.

The Court: Not in the—

The Witness: That is right; the angle the band makes with the bale.

By Mr. Borowsky:

Q. Oh, I see.

A. When that is less than 11 degrees, one hook hoisting would cause a stress in the band equal to its tensile strength.

* * *

(688). Q. All right; when that bale reaches the end of its row and falls down under the rope then you have a much greater force, do you not?

A. Well, I don't know—

Q. Because you have a jerking and a holding.

A. I don't know whether it is greater or less, but you would have a force on slow hoisting without jerk—the force would be the weight of the bale. If it is jerked then the force is greater than the weight of the bale.

Q. Would you say many more times when it is jerked in lifting?

A. I would say up to two times.

Q. So that you would expect more bands to break when you are pulling them out of a high stow and they drop down than you would if you were lifting them straight up, would you not?

A. No, I didn't say that at all. I said that I don't know what the force is to pull it out of stow.

Q. But you do recognize that there is an interplay of forces which may in practical experience indicate as Mr. Keeler testified that they break four times as much when they are being pulled out of stow as when they are being hoisted out of the hold?

A. I heard him say that, yes, but I can't answer from my (689) own experience or knowledge.

• • •

Q. When you are trying to put the hooks on the flat side of the bale it doesn't make any difference whether you put the hooks in the two center bands or the two end bands?

A. I would say that there is less stress on the band in general if it is put in the two center bands, than if it is put in the two outside bands. It doesn't create as much twisting of the band; it is a more nearly vertical lift.

• • •

(691) Q. Would you say that a person not gifted with your background or experience who would handle the bales as they were explained in court, which you heard, was subjecting himself to grave risk?

A. Well, I don't think that the safety factor is very great, and therefore, if the safety factor is not great, I don't think from a safety standpoint it is a perfectly safe manner. It may be the practice but that does not necessarily make it safe.

* * *

Q. Now, do you know of various ways of compressing bales of burlap without using steel?

A. Well, I don't think the steel bands are used to compress it; it is compressed in a hydraulic press, I should imagine; I don't know. I have never been in India.

Q. Are there other materials you can use to bind a bale after (692) they are compressed without using steel?

A. I suppose, but I should think the steel is as good as anything.

Q. Now, if you increase the quality of the steel are you increasing the safety factor in its use as it is intended to be with these hooks?

Mr. Byrne: I object to the question because there is absolutely no showing here that the straps are intended—put on these bales with the intention that they shall be used the way this stevedoring company used them.

Mr. Borowsky: I think there is ample evidence, Your Honor, by Mr. Kesler, one of their witnesses, who stated it very definitely.

The Court: I think there is enough here. I overrule the objection. You may answer if you know, Doctor.

Read the question to him.

(Question read)

The Witness: I don't think I can answer that, Mr. Borowsky, for this reason. By "quality" I suppose you mean strength, and if the strength is increased then a complete change would have to be made in the method of fastening the ends. It is not quite as

simple a problem as that, and I don't think from a practical standpoint I could say.

(693) By Mr. Borowsky:

Q. Well, aren't there different grades of steel?

A. Yes.

Q. Different alloys go into steel.

A. Yes.

Q. Which make them stronger than other steels.

A. That is right, but as the strength of the bands is increased to increase the safety factor, then a difficulty is run into in the fastening of the ends—those buckles or whatever they are called.

Q. Suppose they are—

A. It would make it very difficult then to fasten the ends. I think there are practical limitations, and I don't think it is quite as simple as just increasing the strength of the bands. Certainly you can make bands that have the strength of that music wire I used, but you would never fasten them.

• • •

(694) Q. But if you increase the quality of the buckle and increase the quality of the two end pieces in the same proportionate amount as you do the rest of the band aren't you making a much better band, able to withstand a greater force, stress?

A. Well, Mr. Borowsky, to fasten the two ends of the band when they are placed around the bale, the bale under compression, (695) the band has to be bent through the buckle, around a circle, and bent back on itself. Now, making a better buckle, better quality steel in the buckle would not solve that; the band still has to be soft enough that it can be bent back for a fastening of some sort.

Q. I didn't understand your analysis to mean that there is a weak point in this band at the buckle?

A. I didn't say so. I did not imply so. I said that the steel must be soft enough so that it can be bent back on

itself at the buckle for the purpose of fastening the ends; I did not say that that weakened it.

Q. Well, do you think that increasing the quality of the steel is taking away the necessary flexibility or whatever characteristic is necessary to get it around that buckle?

A. I don't see that you could increase the strength very much and still fasten it by this manner. It might be possible, then, to devise some other type of fastening, but this and one other type are all I have ever seen, and both and both of them require a reasonably soft steel.

Q. Now, let me ask you this. You say that the band would increase in its holding powers or the ability to withstand stress by being looser—is that correct—around the bale?

A. I am not suggesting that as a method. I said that because the band is tight that higher stresses result.

• • •

(697) Q. All right; the accepted way to discharge these bales is by means of hooks into the bands. Now, is it possible to put a band around this bale not that tight that it would reduce its ability to withstand the stress of lifting as you have mentioned it to be, and still stay around the bale?

A. From the standpoint you mentioned, yes, it would lessen the stress in the bale, but you run into another hazard that the band is now loose and could slip, and another type of hazard would be introduced. I don't think that is a practical solution.

• • •

RE-DIRECT EXAMINATION

(713) By Mr. Byrne:

• • •

(714) Q. What are the factors that determine the distribution of weight as between two supports such as these hooks lifting a bale such as this? I direct your particular attention to P-6.

A. That the angle each rope of the bridle makes with the vertical is the same?

Q. In other words, sir, if the ropes are making a different angle with the vertical one will bear a greater weight and one a lesser weight?

A. That is right.

• • •

RE-CROSS-EXAMINATION

• • •

(717) By The Court:

Q. Let me ask a question. These bales as they are lifted out of the square of the hatch are three in number. Would you say that their joinder, for want of a better phrase, on the way up, three of them—what is the likelihood of pull being on one more than the other? What would be requisite to have an equal pull, an equal tensile strength being distributed (718) equally amongst the three bales?

A. I would say it would be extremely rare if it were distributed equally, sir. I don't believe, unless by an occasional chance arrangement, that it ever would be equal in the three.

Q. Would it vary directly with the number of bales?

A. No, I don't think so. You might put two on and pick them up so nicely that you got the same load on both of them, but the load would be greater than if you picked one up at a time, because the rope is pulling at an angle—the bridle—and with three one could ride piggy-back on the others to still further complicate it.

• • •

(723) (Side bar conference reported as follows:)

Mr. Byrne: If the Court please, I have here as Exhibit D-5 contract between Ellerman & Bucknall Steamship Company, Ltd., and the Atlantic & Gulf Stevedores, Inc. I (724) think, sir, that it is admissible as against all parties, because it delineates the duties as between the two parties. Ordinarily, of course, two parties may not contract to change the rights of a third

party, but if, for example the only rights—in other words, let us put it this way: This man would be a trespasser on the Ellerman ship unless he was there on some right, and this contract is admissible in my case as part of my defense, as well as a part of my offense against the third-party defendant.

• • •

The Court: What could can it do you? How could it in any wise bind the plaintiff here unless he was a trespasser, and you are not asserting that he was.

(725) Mr. Byrne. Oh, I am not asserting that he was; I am asserting that he was on there under a contract, and not only do his employers have certain duties toward him, but the individuals do.

• • •

(726) Mr. Borowsky: Your Honor, the mere fact that we have allowed this man to come aboard to handle cargo makes him an invitee by implication. He doesn't have to have an express contract. Morever, I have cited three authorities, and I will cite to Your Honor more authorities.

I should like Mr. Byrne to cite a single authority that supports his position.

• • •

Mr. Borowsky: No one contends there is privity to our man; he never saw it. A contract, as I understand it, (727) Your Honor, creates rights among the parties to the contract; it cannot create a burden upon somebody who is not a party to it. That is elementary.

Mr. Byrne: But he is on the ship under the terms of his contract.

Mr. Borowsky: That is not so.

Mr. Byrne: There we at least frame an issue.

Mr. Borowsky: He never saw that contract.

Mr. Byrne: I didn't say he ever saw the contract.

• • •

(730) (End of side bar conference.)

Mr. Byrne: Judge Ganey, I offer in evidence D-1, D-2, D-3, D-4 and D-5. I want to make very sure that I have included within them two exhibits which were identified during the Quinn deposition, namely the sketch and a plan called a ship's cargo or stowage plan.

• • •

(734) (Deposition of Donald Quinn.)

Mr. Byrne: I will start at Page 55:

"Q. Mr. Quinn, you have drawn a sketch. Is that what you mean by loading a bale with a sling?

"A. Yes."

The sketch was marked D-3 for identification and it is here, ladies and gentleman.

"Q. And have you ever seen more than one bale placed in a sling?

"A. Not gunnies.

"Q. Have you seen bales of other materials where that (735) was done?

"A. Well, when you unload jute, you load three or four bales of jute in one rope sling.

"Q. It's the same principle?

"A. Except it's double, the rope is double.

"Q. But the principle is the same?

"A. Yes.

"Q. I see.

"Mr. Byrne: Now, gentlemen, so the record is clear, it just so happens I have in connection with another matter, a photograph which I will remove from its—

"Mr. Borowsky: May I ask a few questions before you do that?

"Mr. Byrne: Surely.

"By Mr. Borowsky:

"Q. Mr. Quinn, as I understand it, in India the bales have a sling around each unit bale, each single bale, is that correct?

"Q. Are they lifted or are they hoisted from the pier on to the ship one at a time, or are there several of these bales attached to a common ring or hook?

"A. Two at a time.

"Q. So there are two slings that come in, that are held (736) together by some connecting device to the cargo hook, is that correct?

". Yes.

"Q. Now, the picture that you have drawn, D-3, has a, what we call here in the States, a running hook, it that correct?

"A. Yes.

"Q. If that bale strikes against something that will jar the bale, won't that running hook come loose?

"A. No.

"Q. Well, isn't the only thing holding that running hook in place, the tension of the cable lifting up the bale?

"A. The weight of the bale.

"Q. And once you lower it, that can undo itself?

"A. If you load it very qui kly, it's possible.

"Q. If it bangs against anything, it can come off, can't it?

"A. No, it does not.

* * *

(737) "A. When it's real tight with a weight on it, it does not slack away very easily.

"Q. When it's landed or it touches an object so that the weight is suddenly taken off of it, it is subject to coming loose?

"A. Very often they land quite heavily and they have to take the hooks off.

"Q. You haven't answered my question. I know it may happen very often but there are occasions—

"A. I have never seen one.

Mr. Byrne: I wish to state for the record I have extracted from another file, a photograph which does not purport to be a photograph of the unloading operation from the City of Calcutta, it does not purport to be bales of gunnies.

"Mr. Borowsky: In other words, it has no relation at all to this case.

"Mr. Byrne: I won't say that, Mr. Borowsky. I am using it for illustrative purposes only. I will ask the reporter to mark it D-4."

(738) Mr. Byrne: The photograph was marked D-4 at that time.

• • •

"By Mr. Byrne:

"Q. Now, Mr. Quinn, will you look at that photograph and tell me what it shows, if anything, with respect to a sling?

"A. It's got a similar kind of sling to what we used on the gunny bales on the 'Calcutta.'

Q. There is a difference there, is there not, with respect to the number of bales?

"A. Yes, about a half dozen bales on that.

(739) "Q. Is there any other difference you see as far as the principle is concerned?

"A. No, the principle is the same."

• • •

Mr. Byrne: I therefore offer in evidence the photograph in question which has now escaped me.

(Exhibits 6 and 7 marked respectively.)

The Court: I am going to sustain the objection. I think from looking at the photograph and listening to the testimony in the record this does not look to me

like burlap. It is not baled the way the gunnies are baled here. There seems to me to be, and also from the record, just a band lengthwise and crosswise.

Mr. Byrne: If the Court please, that is illustrative of the principle of the way that this ship's officer said this operation should have been done. I think it is clearly for the jury. I quite agree that they are bales of some other commodity. I happen to know what it is, but I say there is no difference in the principle involved, and I think it should be admitted to guide the jury.

• • •

(742) The Court: I don't know; I think the type of material lifted has an awful lot to do here. I think the way they are bound has a good deal to do with it.

• • •

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(753) FRED NELSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marshall:

Q. Mr. Nelson, would you tell us where you live, and keep your voice up, please.

A. I live at 117 Durfor Street.

• • •

Q. By whom are you employed?

A. Atlantic and Gulf Stevedores.

• • •

(745) The Court: At present I will have to read it, and I will read it and rule on P-5. My present thought is not to let it in, but I will rule on it.

• • •

(754) Q. But do you recall the trip that the "Calcutta" made in here when Leighton Beard was hurt?

A. Yes, I recall the trip.

Q. Now, I am going to ask you questions about the occasion when that ship was in. First of all, did you actually see the accident involving Leighton Beard?

A. No, I didn't.

Q. All right, when the "City of Calcutta" came into port tell us what if anything you had to do as far as commencing the unloading operations and the unloading of that vessel.

A. Well, first thing I do, from our office we get a plan. That instructs us what commodities is in each hatch. That is a plan.

• • •

(755) Q. All right, tell us what you did with the cargo plan and who you reported to on the vessel.

A. Well, first I went aboard to see the chief mate.

Q. Do you recall his name?

A. I think his name was Mr, Quinn.

Q. All right.

A. And I told him—he asked me which hatches we were going to work, so I told him we were going to work 1, 3, 4 and 5. I believe. I believe there was five gangs on that ship.

Q. And did you determine what hatches you were going to work from the cargo plan itself?

A. That is right.

Q. Does your cargo plan reveal what type of cargo is to be unloaded at the Philadelphia Port?

A. That is right; it does.

• • •

(756) Q. Can you tell us whether at any time Mr. Quinn either suggested using another method or criticized the method that was being used or suggested a different one?

A. No, he did not.

• • •

(758) Q. During those thirty years, Mr. Nelson, have you had occasion to help unload ships that had cargo of bales of burlap?

A. Yes, sir; I did.

• • •

Q. Now, can you tell us, Mr. Nelson, what method you have seen used throughout that entire period?

A. Just the burlap hooks.

(759) Q. Can you tell us whether or not you have ever seen anyone use or attempt to use slings to unload bales of burlap?

A. Not unless one bale is broken in the ship. Sometimes you find a bale in the ship that is broke, then we will put it in a sling.

Q. By that you mean were all four bands broke?

A. Yes, where it is completely broke.

• • •

(761) A. Well, when we discharge wool we use slings.

Q. As a matter of fact, tell the jury what you mean by slings.

A. Well, slings is a rope swing, but the eye is spliced together which makes just like one solid ring. Just like you take a rope and splice it together, one piece of rope is made into a big circle and that is called a sling.

Q. How many bales do you take up in one of those slings?

A. In wool, well, we can take about six to seven bales.

Q. Six to seven bales?

A. Yes, sometimes we use eight.

• • •

Q. What is the difference?

A. A bale of wool only weighs about 365.

• • •

(762) Q. Now, do the bales of wool have bands similar to the ones that have been marked here as P-7? And I am holding up this one-inch—

A. They have bands like that, but it is much lighter, but instead of being one around it keeps continuously wrapped around like this.

• • •

(763) Q. Can you recall any conversation whatsoever by this Chief Mate Quinn to the effect that you shouldn't use the same method with the wool that you were in fact using?

A. No, sir.

Q. Can you recall whether any suggestion was made to you with reference to changing the method of unloading of these bales of burlap?

A. No, sir.

• • •

(766) Q. Now, I am looking for the names of these ships. Can you tell us whether or not bales of burlap come in more than one size?

A. Oh, yes.

• • •

CROSS-EXAMINATION

(772) By Mr. Byrne:

• • •

(772) Q. Mr. Nelson, you are not quite answering my question. I said that you as a stevedore—I am not talking about the "City of Calcutta" or any particular ship, or any particular company ships—isn't it true that you as a stevedore will frequently remove cargo that is going to be carried to some other port for discharge in order to facilitate the discharging of the cargo at Philadelphia, and then you restow the cargo that you have moved; isn't that true?

A. Sometimes that happens, yes.

Q. In other words, it would be nothing unusual for you to move cargo that was going to another port in order to either facilitate or to make safer the discharge of cargo at (773) Philadelphia; that is true, isn't it?

A. That is true sometimes, yes.

• • •

(791) Q. Mr. Nelson, is it fair to summarize part of your testimony of Monday that you simply have no recollection one way or the other of any conversation with Quinn who was the chief mate of the "City of Calcutta" on July 1, 1955?

A. That is right.

* * *

(802) Q. And you agree, don't you, that to perform this operation properly, Mr. Nelson, it is best—as a matter of fact it is more than best—it is proper to distribute the weight between two hands; you don't want to put it all on one?

A. That is right.

Q. And it should be distributed even between the two hands?

A. That is right.

Q. Now, Mr. Nelson, I don't know whether I can illustrate my point with this or not. Would you mind holding that for me. Stand up, please. Put your hands about the center of each end. Now, do you think the weight of that is equally distributed between your two hands? Is that right?

A. Yes, that is right.

Q. Now, would you turn one end up. No, just hold one hand where it is and put the other up at about a 45-degree angle. Leave one hand where it is and just raise this end up to about a 45-degree angle. Is the weight of that thing that you hold in your hands still equally distributed between your two hands?

A. No, not right now it ain't, no, because all the weight is back here.

Q. All the weight is on the lower one?

A. On the lower one.

* * *

(803) Q. All right. Mr. Nelson, on the photograph that is before you, P-6, the weight of at least one of these bales is predominantly upon one hand; it is not equally distributed, is it?

A. It may not been evenly distributed, but—

Q. Just answer my question; then explain.

A. No, it is not.

* * *

(804) Q. There is nothing on an angle here; all right. Now, you have said, Mr. Nelson, that these bales get on an angle when they turn after they are lifted; is that right?

A. Sometimes.

Q. Well, that is the only way they would get on an angle; you wouldn't start them off from the bottom on an angle, would you?

A. No, when they pick them up and drag them up, 90 per cent of the drafts come out three at a time, just an even lift. 90 per cent of the time.

Q. But the other 10?

A. Because they know they have to come out that way.

Q. The other 10 per cent what, Mr. Nelson?

A. Well, there is a chance of some time when they come out in the square of the hatch and they touch them and start up, one may turn. Like some hooks, you got a New York hook where the pendant will turn, and as long as it turns, why sometimes the draft will take a turn or something like that. You can't come out with them a hundred per cent, a hundred times, perfectly straight.

Q. I see, so that at some number of times—you have used the figure 10 per cent; I don't care whether you use 5 or 10 per cent; whatever figure you use—one of those bales in the draft will turn; is that right?

(805) A. That is right.

Q. And you have no way of knowing whether it will in turning put more weight on one band than on the other or not, do you?

A. I don't think it will put more weight on it.

Q. You don't think it will?

A. No.

Q. Even if it comes out at an angle?

A. If it is an angle, it is different.

* * *

(807) Q. Now, the greatest strain is placed upon these bands, wouldn't you agree, when they are being broken out of the stow? Isn't that true?

A. If they are tight, yes.

Q. Yes, if they are tight.

A. If they are tight.

Q. And, of course, most of these cargoes are stowed tightly?

A. Well, yes, they are pretty tight.

* * *

Q. Well, didn't you at any time look down?

A. Well, when we first started the hatch I looked down the hatch.

Q. Do you remember what you saw?

A. Well, we do around eighty of these an hour, I mean, and everything was coming out pretty nice; I mean it wasn't too tight, although No. 1 ain't like No. 2 hatch; it is tight, (808) but No. 1 is a tight place to work in.

Q. No. 1, you will agree, is the tightest place to work?

A. It is the tightest hatch on the ship.

* * *

(810) Q. And you consider yourself an expert stevedore?

A. Well, I wouldn't say an expert.

Q. Well, don't you think that Atlantic & Gulf Stevedoring Company is composed of expert stevedores?

A. Well, yes.

* * *

(812) Q. Mr. Nelson, if I recall the testimony correctly one witness in this case has testified that it would be safer, after the breaking-out operation at which time two hooks are placed in two bands on a bale of burlap, to rehook—in other words, remove the two—

Mr. Borowsky: Now—

Mr. Byrne: (Continuing) Hooks from the bands that were being pulled during the breaking-out operation and put them into other bands that had not been

used during the breaking-out operation, before the lifting operation began.

Mr. Borowsky: If the Court please—

(813) Mr. Byrne: (Continuing) My question to you is, do you agree or disagree?

Mr. Marshall: Wait.

Mr. Borowsky: Just so I get my objection on the record, it is my understanding that the witness never said anything of that kind. He said, "It is better to rehook," and that is all he said. He didn't say anything about other bands. If Mr. Byrne is trying to get in testimony by way of that question I object to it.

The Court: I remember his saying "rehooking" but that he went into the detail that you have I do not remember, Mr. Byrne.

Mr. Marshall: I withdraw my objection so we move along. Go ahead and answer as far as I am concerned.

The Witness: Well, I don't think it would make any difference unless the bands were broke. If you would have to change them around I don't think it would make them any safer.

By Mr. Byrne:

Q. So therefore you never gave men any instructions to do that?

A. No, sir.

* * *

(832) Q. Mr. Nelson, Judge Ganey asked you about someone named Dick Coffey. Who is Dick Coffey?

A. I don't even know Dick Coffey.

Q. You don't know Dick Coffey. Perhaps I misunderstood you on Monday. Are you saying now, Mr. Nelson, that you had no discussion with Mr. Quinn, the chief officer of the "City of Calcutta," on July 1 of 1955, during which discussion there was talk about the way in which this cargo

of burlap was being discharged, or are you saying you just cannot remember today whether that conversation took place or not?

Mr. Marshall: Objected to. Just a moment. I object to it as having been covered numerous times and that it is not proper recross-examination as a result of my redirect examination.

The Court: No, we ought to get it as clear (823) as we can possibly get it. Objection overruled.

* * *

The Witness: But, just like I said, it is three years ago, and I don't remember; but just like I said, if I had the vessel I had to talk to Mr. Quinn, but I can't remember Mr. Quinn, or whatever his name may be, coming to me and saying anything about the cargo wasn't being discharged properly.

By Mr. Byrne:

Q. I see; you just don't remember whether that conversation took place or not?

A. That is right.

Q. I have one other question I should have asked you earlier, perhaps. You said that some of this cargo, namely the bales of wool, were not discharged with hooks; that they were discharged with rope or wire rope slings.

A. Not wire rope; slings—rope slings.

(824) Q. Rope slings?

A. Yes.

Q. By "sling" you mean a single wire with an eye spliced in and you put the runner through the eye—

A. That is right.

Q. —almost like a kid's lasso, and as you raise the weight it pulls it tight; is that correct?

Mr. Marshall: I object, because the witness has already said he did not mean "wire" and that is prefaced in this question.

* * *

The Court: Objection overruled.

• • •

Q. I just want to know what you mean, if you will describe it for me, by slings.

A. A rope sling—a rope sling is a long piece of rope with an eye spliced in it. It is like a hoop. If you hold it up it would look like a lasso; it would be a circle. When (825) you are unloading wool, wool is smaller bales. They put eight in a draft; they sling them and send them out.

Q. Right. Now, who reaches the decision as to whether you, Atlantic & Gulf Stevedoring Company, will discharge a given cargo of bales by the use of hooks under the bands or by the use of a rope sling? Who reaches that decision?

A. Well, the only—

Q. Who makes the decision, you?

A. I make the decision.

• • •

"Q. What factors influence you in making (826) that decision?")

The Witness: We work that—work wool on slings at all times.

By Mr. Byrne:

Q. We work what?

A. When we are discharging wool we use slings on wool all the time, and everybody does.

Q. You must have some reasons why you use a hook in one case—

A. Well, I don't know what reason it is. I say, we use slings. I think it is safer, because when you put eight small bales of wool in a sling and it tightens up it is a safe load.

Q. And eight small bales—how much would each bale weigh? Between 200 and 300 pounds?

A. Oh, about 250, I guess.

Q. How much?

A. 250.

Q. So that you are arranging a load of 250 pounds multiplied by eight, which is about 2000 pounds?

A. That is right.

Q. Now, how large is each bale of wool, approximately?

A. About 3½ foot high.

Q. Now, you will have to give me three measurements —height, (827) depth, width.

A. They were about a foot wide.

Q. By how much? Another foot?

A. Foot by a foot, say.

Q. You raise eight of those in a bale?

A. That is right.

Q. And you concede that it is safer to do it with a sling than with hooks?

A. That is right.

* * *

(832) By Mr. Borowsky:

* * *

Q. And because of the size of those woolen bales one man or two men can put their hooks in it and turn it over, can they not?

A. That is right.

* * *

By Mr. Byrne:

Q. Mr. Nelson, on this ship, on this day, or at least on this voyage to Philadelphia, in addition to bales of burlap you had bales of wool, you had bales of hessian cloth, you had goatskins in bales, you had bales of jute, and you had bales of jute webbing; is that right?

A. That is right.

Q. What baled cargoes did you discharge by means of hooks and what cargoes did you discharge by means of slings?

A. Well—

Q. Let us start with wool.

A. The burlap—the wool?

(833) Q. The wool was slings, wasn't it?

A. Slings.
Q. And the burlap was hooks?
A. Hooks.
Q. And the hessian cloth?
A. Hessian cloth?
Q. Yes.
A. Slings.
Q. The goatskins?
A. Nets.
Q. The jute?
A. Slings.
Q. And the jute webbing?
A. Slings.

• • •

(835) WILLIAM WHEELER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marshall:

Q. Captain Wheeler, would you tell us what your address is, (836) please?

A. I live at 364 Washington Avenue in Pelham, New York.

Q. All right, sir, how old are you?

A. Forty-one.

Q. Would you tell us what your occupation is today?

A. At present I am employed by the Walter J. Byrne, Incorporated, which is a firm of marine consultants and industrial consultants, of New York City.

• • •

CROSS-EXAMINATION

• • •

(881) By Mr. Borowsky:

Q. Let me put it this way. In all your experience have you ever seen bands of a bale break when the bale is being lifted up straight from the square of the hatch after it has been settled, at a moderate rate of speed and in a straight

lift, before the lift has been completed, without the bale coming in contact with any object or catching under any deck?

A. I have never seen one break under those conditions —assuming the band was intact.

Mr. Borowsky: That is all I have.

By Mr. Byrne:

Q. That is quite a large assumption, isn't it, Captain?

A. It is.

Q. Pardon me?

A. It is.

Q. Because the bands can be partially torn in pulling out of stow and break during the lift, and yet you couldn't say whether they were defective before they were pulled out of stow or not, could you?

(882) A. That is right; there could be an invisible flaw in the metal itself.

Q. And as a matter of fact the very pressure—shall I say side pressure or tearing pressure of the hook against the edge of the band could weaken it.

A. To a very slight degree it might weaken it.

• • •

(889) Q. No, no; I am sorry. Have you ever seen a band on a bale of burlap, after it had been lifted—

A. By using—

Q. —by a hook such as this—

A. On that particular band?

Q. —showing a tear?

A. I am sorry, sir.

Q. —that showed a tear partly through the band?

A. I have seen bales on the pier and in the ship where the band did—was partly torn—but I have never seen that particular bale lifted by that particular band.

• • •

(891) Q. Was there any instance in your experience where you as a ship's officer or a member of the ship's crew did

the actual work of discharging bales of burlap such as these?

A. No.

Q. That was always done by longshoremen?

A. Yes.

Q. Now, you said that when you left the sea and went to work for the McGrath Corporation your first job was in the gear room; that is correct, isn't it?

A. That is right.

Q. And you found at that time, at least, that there were a great many different devices used by stevedores; is that correct?

A. In lifting various types of cargo.

Q. In lifting various types of cargo, stevedores being (892) experts in that field.

A. As a company, yes.

Q. Yes. Is it fair to say that while you have seen with your eyes a number of cargoes, a number of instances when burlap in bales was discharged from ships, you have never actually worked in the operation other than as a stevedore?

A. Other than as a supervisor, yes.

Q. Supervisor. Now, you said that you had seen these bales or the bands on bales broken. Could you express in terms of percentage, for example, the number of broken bands with respect to the number of bales? In other words, if you were discharging a thousand bales, in your experience would you see five bales that had a band that broke sometime during the operation, or ten, or twenty?

A. Sometime during the operation?

Q. Yes.

A. Not only in lifting but in all phases of the operation?

Q. Yes.

A. Oh, I would say roughly between 3 and 5 per cent of the bales.

Q. Between 3 and 5 per cent?

A. At all phases of the operation.

Q. And you said that the greater number in your experience occurred when they were being dragged out of stow?

(893) A. Absolutely.

• • •

(920) CHARLES WILSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marshall:

Q. State your name and address.

A. Charles Wilson, 1929 West Airdrie Street.

Q. Now, Mr. Wilson, will you tell the jury your occupation, please.

A. I am an investigator.

• • •

Q. And will you tell the jury what you and I did on February 10 of this year, where we went, what we got, what we did with it?

(921) A. On February 10 of this year, right after lunch we went to the Chase Bag Company.

Q. Where is that?

A. Delaware Avenue and Dickinson Street.

Q. All right, what happened there?

A. We went to the office manager and told him we wanted some bands that they use around these bales.

Q. Bales of what?

A. Bales of burlap.

Q. All right; and what happened?

A. He telephoned the stockroom.

Q. Don't tell us what he said, but as a result of his phone call what happened?

A. A man came up from the stockroom with some bands, five bands. He said, "Is this enough"? And the manager said, "Yes, I think so."

• • •

CROSS-EXAMINATION

(922) By Mr. Byrne:

Q. One question: Were these bands that you got from the stockroom of this Chase Bag Company new banding or couldn't you tell what it was?

A. I didn't get the question.

Q. Was that new banding or was that used banding?

A. It was taken from their stockroom, and out of sight. I don't know what they were.

* * *

(1022) WILLIAM A. TONER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marshall:

Q. Mr. Toner, what is your occupation?

A. I am the manager of Atlantic & Gulf Stevedores.

Q. Manager of what port?

A. Port of Philadelphia.

* * *

(1022a) Q. Since 1945 has your company engaged in unloading bales of gunnies for either Ellerman or other companies?

A. Yes, sir.

Q. Now, were you present on the vessel on July 1, 1955, when one of your employees, Leighton Beard, was injured?

A. I was on the vessel.

Q. All right, sir; can you tell us what if any conversation any of the ship's officers had with you concerning the method that was being used to discharge those bales of gunnies?

A. No, sir; the foreman went down to start the ship, Mr. Nelson. I came down about quarter to. I went on the vessel, and then I walked to No. 4 hatch, went back to No. 1 hatch, (1023) saw they were started. At that time I went

over to the office in answer to a telephone, and when I came back Mr. Beard was lying in the driveway on a 4-wheel trailer. I was on there up till 3:30. I think it was approximately 3:30 when he was injured.

• • •

Q. All right, can you tell us, sir, what if any criticism was made, or suggestion of new method, or any other matter relating to the devices and the methods by which your people were unloading this vessel, if any, was made?

A. It has never been suggested or changed.

Q. Can you tell us, Mr. Toner, what the present methed of unloading bales of gunnies is by Atlantic & Gulf Stevedores?

A. We discharged the "City of Bath" this Monday, and we picked up bales weighing 1700 pounds with the identical same (1024) hooks for Ellerman-Bucknall, and we discharged the "City of Agra" last Friday, bales of burlap, with identically the same hooks.

• • •

Q. And can you tell us whether or not the same procedure has been used on all the Ellerman and City Line vessels since July 1, 1955, to the present time?

A. The same method has always been used.

• • •

(1025) Q. Can you tell us, Mr. Toner, what if any criticism you have had called to your attention by any of the officers of any of the City of Ellerman ships on which you have unloaded bales of burlap since July 1, 1955, up to the present time?

A. It has never been critized. No suggestions.

• • •

CROSS-EXAMINATION

By Mr. Borowsky:

• • •

Q. Of what you have personal knowledge since you came to Atlantic & Gulf, and when you had anything to

do with the discharge of bales of gunnies, what methods did you use?

A. Used the same method as we have always used.

Q. Discharging three bales at a time?

A. That is correct.

Q. With two hooks in the bands, two bands on each bale?

A. That is correct.

Q. And could you give us some idea since 1943 how many times (1026) Ellerman Line vessels have been so discharged by Atlantic & Gulf?

A. On the India run I suppose they have two a month, so that would be approximately thirty-six vessels a year.

• • •

By Mr. Byrne:

Q. Bill, in your experience about how many bands on these bales of burlap are broken for, let us say, every thousand tons unloaded?

A. The only time that you would have a band broken—

Q. Bill, excuse me—

A. How many times?

Q. Yes.

A. I would say four or five times.

Q. For every thousand tons? Or four or five times for what?

A. You can't go by tons; you have to go over the year.

Q. All right, four or five times a ship, would you say?

A. Oh, no; over the year. If you had four a year—I couldn't very well do operation like that if I had successively saw bands broken—I wouldn't have my job if I operated like that.

Q. I mean at any time during the unloading operation, whether they are being pulled out of the stow or being hoisted or pulled over the side or lowered to the dock. (1027) A. Only when they would catch underneath the coaming.

Q. Bill, how many times?

A. What did you say now?

Q. How many times did you break bands at any point in the loading operation?

A. I would say two or three times a year.

Q. Two or three times a year?

A. That is right.

• • •

(1031) Q. Now Bill, what tests were made by Atlantic & Gulf Stevedoring Company of the strength of these bands prior to July 1, 1955?

A. We made no tests.

Q. Well, I realize that, but you sent it out to Tinius-Olsen or someone like that to make the tests?

A. Who?

Q. Atlantic & Gulf?

A. No, sir; we didn't send any out.

Q. In other words, you never had any tests?

A. No, sir.

• • •

(1046) BERNARD PORIES, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Byrne:

Q. Mr. Pories, are you connected with any organization? Do you work for a company?

A. Yes, I do.

Q. What company?

A. Frank R. Gunn Company.

Q. What is your occupation with that company?

A. I am a surveyor.

Q. And what sort of survey work does Frank R. Gunn Company do?

A. We handle damaged cargo or general inspection of cargo as stowed in the holds, hull surveys, et cetera.

• • •

(1047) Q. And was any such examination made of the cargo arriving on the SS "City of Calcutta" on or about July 1, 1955?

A. Yes, it was.

Q. And by whom?

A. By myself.

Q. Directing your attention, Mr. Pories, to the burlap or gunnies as they have been referred to here, did you make any examination of that cargo?

A. Yes, I did.

Q. Did you find anything with respect to the metal bands that bound the cargo into bales?

A. Yes, I did.

• • •

(1049) Q. I see; and directing your attention particularly to this discharge of burlap or gunnies in Philadelphia on July 1, 1955, did you at that time make any record with respect to the bands binding the burlap into bales?

A. Yes, I did.

Q. And that was made when?

A. It is in my report.

Q. It was made at the time?

A. I mean, the damage or the broken bands were found on the pier.

Q. All right.

A. At the final inspection of the cargo.

• • •

(1050) Q. Mr. Pories, I show you something which has been marked Exhibit D-4 in this case and ask you what it is.

• • •

The Witness: After we give the stowage we say, "The following notations were made during the discharge of cargo," and under burlap I have several markings. Do you want me to read that exactly, including the typographical error.

By Mr. Byrne:

Q. Yes.

A. Number of bags sighted with metal bags broken, covers torn and contents exposed, a few bales sighted slightly cut. Now, if I may there is a typographical error in there. It should be "bales" rather than "bags." I have referred to it as "bales" throughout and I guess the young lady who typed it made an error there and I didn't pick it up when I signed the report.

(1051) Q. Did you know anything at all about an accident on the ship at that time?

A. No, I did not, sir.

* * *

(1159) The Court: No, I don't think there is. I don't think I am going to submit interrogatories. You gentlemen are too far apart, except broadly, and I don't want to confine myself in the delineation of what the jury should find. I would rather charge generally in the vein that I have. I will give all of you ample time. I will say to the jury that counsel may have taken the time as a (1160) part of the practice agreed upon. I do not want, in the light of the difference in judgment, other than general, broad interrogatories which I can frame so they cannot be harmful one to the other. I wish I had that competency.

Mr. Byrne: Judge Ganey, can I say something before you actually, finally foreclose the question of interrogatories?

You have mentioned the fact that counsel cannot agree. Counsel, so far as Mr. Marshall and Mr. Borowsky, have an identity of interest here, and using the vernacular, one is scratching the other's back a little bit. Mr. Borowsky has no basic objection to interrogatories except that he is not being, I suggest, fair with the Court; he is trying to hone his own knife to make

sure that nobody else has a fair shake. He does not want an answer to an interrogatory which might possibly be given and which might possibly require the Court as a matter of law later to enter a verdict for the defendant.

Mr. Borowsky: If Your Honor please—

Mr. Byrne: Mr. Borowsky, please; I listened to you.

Mr. Borowsky: All right.

Mr. Byrne: I suggest, sir, that with so many complicated issues, the only fair way that you can properly (1161) deal with the really complex issues in this case is to have from the jury some indication of the basis upon which it has made its findings, because there are really serious questions of law here, Judge Ganey.

The Court: There are not too many, Mr. Byrne.

Mr. Byrne: No, there are not too many, but they require delineation.

The Court: They require delineation, and the only real question is how far—the question of negligence and unseaworthiness as between you and Mr. Borowsky is not too difficult, only in so far as Mr. Borowsky does not want to have such a degree of negligence. He doesn't care whether it is concurrent or whether it is sole; he just doesn't want it to flow over too much on the other side which would rule him out, but to delineate that is pretty difficult unless you put it in a few short concise words as an interrogatory.

Mr. Byrne: I rather felt before lunch that Your Honor thought the interrogatories suggested came very close to doing that, and to delineating the issues fairly. They can probably be cut down even more if you think there are too many of them, and I do suggest—

The Court: Well, unless you word them so that we can all agree—I think the difficulty is between yourself and Mr. Marshall primarily.

(1162) Mr. Byrne: Mr. Marshall, of course, has about nine or ten thousand dollars of interest on the plaintiff's side of the fence here.

Mr. Marshall: The simplest negligence case tried before the Municipal Court where you have a bailment situation and counterclaim—the actual legal delineation is far more intricate, believe it or not, than in the delineation that you see in this case.

The Court: I am not concerned with that.

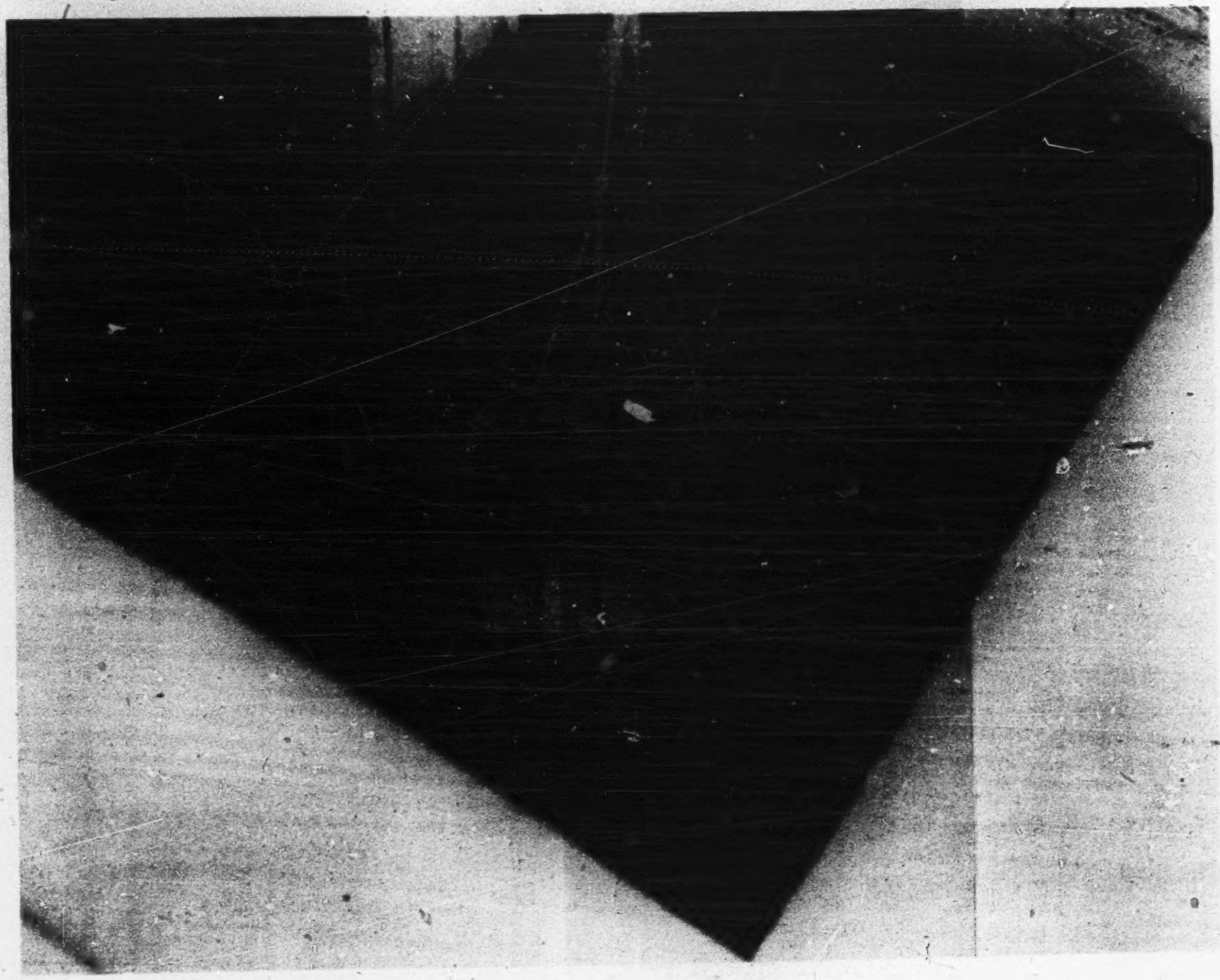
Mr. Marshall: Why make such an issue?

The Court: I have never since I have been on this bench—and I just talked to Judge Van Dusen—where counsel cannot agree within a certain limit, allowed myself to be pinned down—I don't mind making mistakes, but I don't want to be pinned down by the wording of an interrogatory. Here, a jury with a general charge can do very well. I think it ought to be delineated. I really do. I think Mr. Byrne is right in insisting. I think I should try to the jury to delineate his position equally with the plaintiff's and with yours, and he is right to the degree that he has a position of responsibility first in defense to Mr. Borowsky, and then in trying to saddle you he has a double or a dual responsibility, and I am not going into personalities at all. I think it ought to be delineated and I would like to submit (1163) them, but if you gentlemen cannot agree—I think, Mr. Byrne, if you would sit down and perhaps by concession broaden the point, using words like "responsibility" without getting into major and minor causes of action, that perhaps we can agree.

You have got to take the unseaworthiness first and then go to the negligence end of it, and if you can

resolve those in wording, in phraseology, in a few short, concise statements by words agreeable to you, I will be happy to do it; if not, I will just have to do the best I can. Maybe I can, over the weekend, do something about it, but I know that you want to put your best foot forward; each of you wants a verdict and you ought to have that in mind, but at the same time what good is a verdict if you have to retry it?

• • •



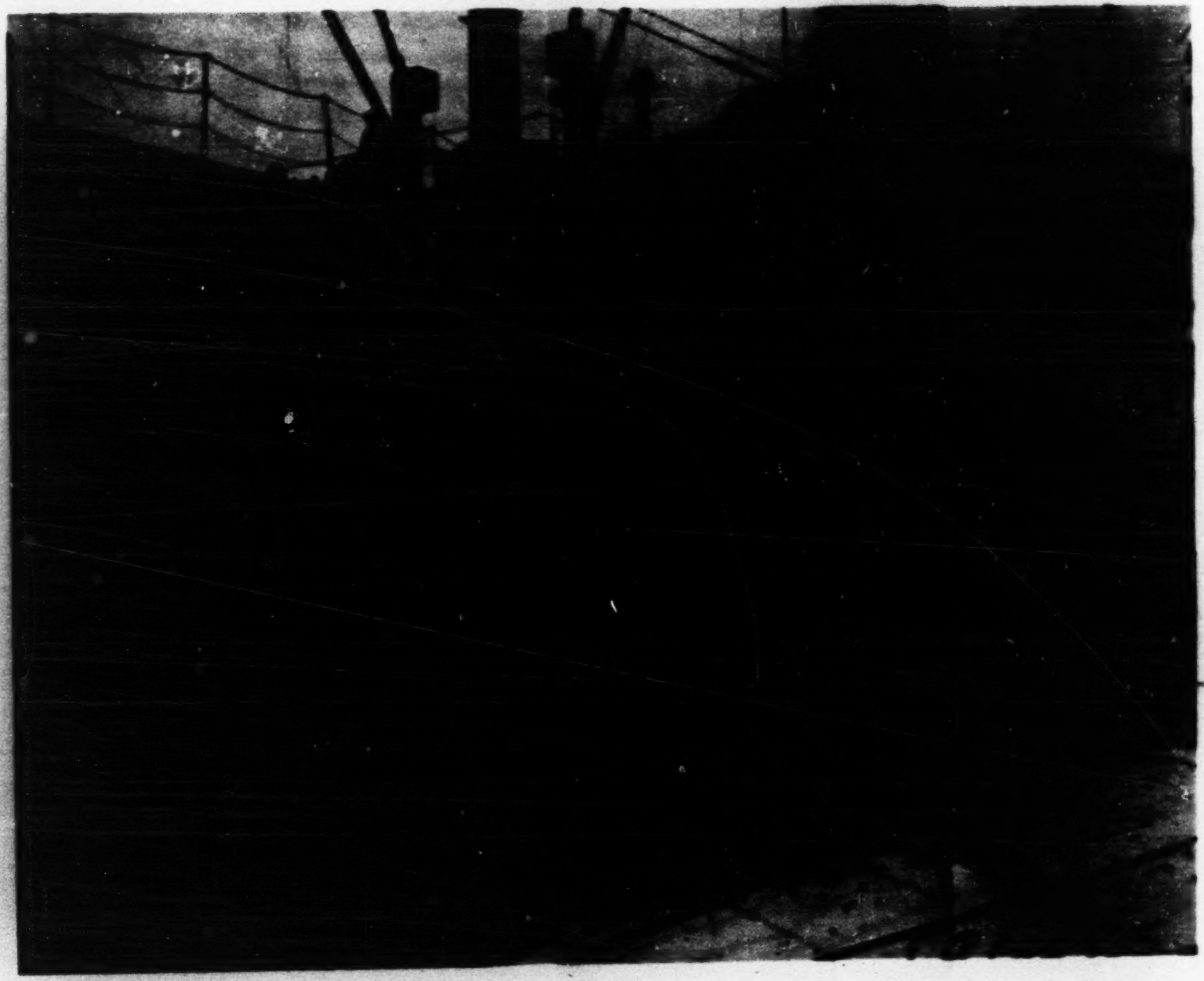


Exhibit D-5.

MEMORANDUM OF AGREEMENT BETWEEN ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LIMITED, Party of the First Part, and the ATLANTIC & GULF STEVEDORES, INC. (PENNSYLVANIA), hereinafter referred to as "the stevedores," Party of the Second Part.

The party of the first part agrees to give the stevedores the stevedoring work on vessels owned, managed, chartered or otherwise controlled by the party of the first part loading and/or discharging at the port of Philadelphia, provided that the stevedoring work is not otherwise fixed by Charter Party or government contracts, etc., and the stevedores undertake to perform the stevedoring work on the following terms and conditions.

The stevedores shall take delivery of goods whether by land or by water at the point where the shipper is bound to deliver them according to the customs of the port of Philadelphia; transport the cargo to and load on board carrying steamer with all due dispatch and safely and properly stow same according to ports of destination, including building up wings when midships are required to be kept open, laying dunnage but to apply only to safe and proper stowage and not to include tomming or shoring with timber or otherwise as is generally necessary with full cargoes of rails, or other deadweight cargo; all to the satisfaction of the Board of Underwriters of New York or other surveyors.

The stevedores shall break out, discharge and place the cargo on the wharf or into craft, as required, according to the custom of the port of Philadelphia, and the cargo discharged on the wharf shall be placed as far as possible according to marks. Transshipment cargo shall be placed on the wharf according to destination, so that it can be promptly forwarded without confusion, and all valuable cargo, such as shellac, rubber mica, goatskins, etc., shall be kept quite apart from other goods on the wharf.

All the work shall be done with every care and due dispatch to the satisfaction of the party of the first part and/or the Owners and/or Managers and/or the Charterers or accredited representatives.

The stevedores shall be paid for loading and/or discharging at the port of Philadelphia at the following rates. However, the rates specified do not include tally or plan clerks.

All tons referred to in this contract to be as per manifest unless otherwise stated.

The stevedores shall supply all the necessary tackle and appliances for handling the cargo but shall have the use of cargo appliances as on board, including rope and steam as customary.

Loading: Including Camden, N. J.; Paulsboro, N. J.; Chester, Pa.; Wilmington, Delaware; Point Breeze, Phila., Pa.

Drums oil, Philadelphia	$0.53	
Drums oil, Paulsboro	0.55	
Cases oil, Philadelphia	0.11	
Cases oil, Paulsboro	0.12	
Steel	3.88	long gang, ex pier
Steel	2.97	short gang, open top
Tin plates & steel sheets	2.86	long gang, ex pier
Tin plates & steel sheets	2.21	short gang
Pig iron	2.59	
Autos and Fords	1.70	
Flour	2.98	
General cargo	2.93	
Oil in small pkgs. (Phila. & Paulsboro) (weight)	2.82	
Shoe lasts	5.35	
Newsprint	3.98	
Soya beans, trimming	0.61	per ton 2240#
Soya beans, bagging, sewing & stowing	3.85	per ton 2240#

Heavy lifts over 5 tons or outside of ship's handling capacity, at cost plus insurances and taxes plus 20% of straight time labor cost.

The rates for loading include the handling of all dunnage necessary for the stowage of the cargo; when working at refineries they also include as per I. L. A.

Agreement: 1 hour traveling time each day—$2.27 per hour for each man. Transportation of men to Paulsboro, N. J. by bus—charge $37.75 per trip—Waiting time $1.25 per hour per bus.

The rates quoted for case oil are flat rates, and include the laying of the floors and stowing cargo in every available space to entire satisfaction of the party of the first part or its representatives, and all others who may be concerned.

DISCHARGING: PHILADELPHIA, PA.; CAMDEN, N. J.; WILMINGTON, DEL.

Pig iron	$1.86 per ton 2240#
Jute, gunnies	1.88 per ton 40 cu. ft.
Hides, skins (bale)	2.16 per 16 cwt.
Hides, skins (barrel)	2.59 per 20 cwt.
Rubber	3.88 per 20 cwt.
Tea	3.88 per 50 cu. ft.
Wool	1.88 per ton 40 cu. ft.
Ore	2.47 per ton 2240#
Bones crushed in bags	2.59 per ton 2240#
Sisal	1.88 per ton 40 cu. ft.
Ballast	2.54 per ton 2240#
Wattle bark	2.59 per ton 2240#
Wattle bark ext.	2.98 per ton 2240#
Asbestos	2.59 per ton 2240#
Scrap moulds	1.60

General cargo:

Bombay & Karachi) Calcutta, Chittagong) Rangoon)	1.90 per scale ton
Madras and Cocanda	2.08 per ton wt. or meas.
Colombo Tuticorin, Aden) Port Sudan, Cochin)	2.47 per ton wt. or meas.

DISCHARGING: (M. A. N. Z. LINE)

Wool	2.59 per ton 2240#
Skins in casks	2.59 per ton 2240#
Skins in bales	2.68 per ton 2240#
Manganese ore	2.47 per ton 2240#

Sand in bulk:

Zircon) Ilmenite) Rutile) in bulk	2.00 per ton 2240#
Zircon) Ilmenite) Rutile) in bags	2.59 per ton 2240#
General cargo	3.11 per ton 2240#

The rates include the cost of all trucking, winchmen, compensation insurance, old age benefit and Social Security Taxes, vacation, pension and welfare allowances, whether Federal or State, tiering up to regulation height, rigging and unrigging, taking off and putting on hatches and breaking down cargo on pier when loading.

Commodities for which no rates are quoted are to be handled at general cargo rate until a rate can be mutually agreed upon.

In cases where vessels are loading or discharging in the stream or at any points outside the harbor limits, the cost of all transportation of men and gear to and from vessels to be paid for by the party of the first part, including travel

time as per International Longshoremen's Association Agreement.

When it is necessary to handle cargo by hand to or from compartments other than usual cargo spaces, such as peaks, store rooms, bridge, alleyways or lazarettes, the labor necessary to accomplish the work will be charged for at cost plus 10% of straight time labor cost, plus insurance, old age benefit and Social Security taxes, and vacation, welfare and pension allowances.

Overtime to be charged for at actual cost, plus insurance, old age benefit and Social Security taxes. Extra labor to be charged for at actual cost plus 10% of straight time labor cost, plus insurance old age benefit, Social Security taxes, vacation, welfare and pension allowances.

In the event that under any government order or final determination by a court of competent jurisdiction, labor is required to be paid wages in excess of the wages paid under the Federal Fair Labor Standards Act as presently interpreted throughout the port, such wages plus insurance and Social Security and unemployment taxes together with any additional amount other than wages for which the Contractor may be legally liable under the Act, shall be reimbursed to the Contractor by the Owners, Agents or Charterers at cost.

When men are employed and detentions in excess of 15 minutes occur, or when men are employed, and are unable to work through causes beyond the stevedore's control, or when men are to be paid for a minimum working period in accordance with the I. L. A. Agreement, the cost of such time will be charged for at cost, plus insurance, old age benefit and Social Security taxes, vacation, welfare and pension allowances.

Regular working hours shall be from 8 a.m. to 12 noon and from 1 p.m. to 5 p.m. on all days except Sundays, Saturdays and legal holidays. All other conditions pertaining to minimum working hours etc., as per I. L. A. Agreement. All work performed outside of said regular

working hours, except meal hours to be classed as overtime and to be paid for by the party of the first part at the overtime rates. However, in the event the men work through the meal hours, the stevedores shall be compensated for the men's time pursuant to the I. L. A. Agreement at cost plus insurance, plus old age benefit and Social Security taxes, vacation, welfare and pension allowances.

Explosives to be handled in accordance with the custom of the port of Philadelphia as per I. L. A. Agreement; plus 10% for overhead, gear and profit, plus insurance, old age benefit and Social Security taxes, vacation and welfare and pension allowances.

When handling cargo damaged by fire, water, oil, etc., and where such damage causes distress or obnoxious conditions or in all cases where the men are called upon to handle cargo under distress conditions, charges are to be based on the labor cost in accordance with the I. L. A. Agreement, plus 10% for overhead, gear and profit, plus insurance, old age benefit, and Social Security taxes, vacation, welfare and pension allowances, and transportation of men in lieu of the rates quoted, together with the cost of such equipment for the protection of the men as may be required.

Stevedores undertake to handle all cargoes with the utmost care and attention and to pay promptly any claim against the ships caused through rough and careless handling and/or theft and pilferage by the stevedores' men during the time of stevedoring operations. The ship's officers or other authorized representatives will call such occurrences to the attention of the stevedores and the responsibility fixed at the time in so far as it may be possible to do so.

Ship is to supply necessary dunnage.

The stevedores shall not sublet any of the work in this contract except by written consent first obtained from the party of the first part.

The stevedores agree to carry Workmen's Compensation Insurance for the protection of their employees and Public Liability insurance in respect of injuries arising from the stevedoring operations, to the extent of $500,000.00 any one person injured and $1,000,000.00 any one accident; also, insurance to the extent of $1,000,000.00 covering the stevedore's legal liability in respect of damage to ship and/or cargo.

The stevedores will be responsible for damage to the ship or its equipment caused by the negligence of their employees, and for damage or loss of cargo through the negligence of their employees. When damage or loss occurs to cargo or ships' equipment by reason of such negligence, the ship's officers or other authorized representative will call this to the attention of the stevedores and the responsibility fixed at the time in so far as it may be possible to do so.

The stevedores agree to give the ships the best possible attention and dispatch and guarantee to supply sufficient men to carry out the work, but are not to be held responsible for strikes or accidents beyond their control.

The above rates are based on the present rate of wages and compensation paid to the longshoremen. Any increase in wages or conditions are to be added to the rates pro rata, and any decrease in wages and conditions are to be subtracted from the rates pro rata.

This agreement will take effect from 1st October 1952 and will terminate on the 31st December 1953.

For and on behalf of:

ELLERMAN & BUCKNALL STEAMSHIP CO., LTD.,

(Sgd) L. J. LLOYD,
Managing Director

ATLANTIC & GULF STEVEDORES, INC. (PENNSYLVANIA)
JOHN W. MCGRATH, President

INTERROGATORIES SUGGESTED BY THE DEFENDANTS ELLERMAN LINES, LTD. FOR SUBMISSION TO THE JURY.

(1) Was there any negligence on the part of the ship owner which caused or contributed to the plaintiff's injuries?

Answer yes or no.

(2) Did Atlantic and Gulf Stevedores, Inc. unload the SS. City of Calcutta in a safe, proper and workmanlike manner?

Answer yes or no.

(3) If your answer to interrogatory No. 1 is yes, did the negligence of the ship owner arise out of or operate upon a situation which had been created by the method of unloading adopted by Atlantic and Gulf Stevedores, Inc.

Answer yes or no.

(4) Were the bands involved in the accident to the plaintiff reasonably fit for the purpose for which they were intended?

Answer yes or no.

(5) If your answer to the preceding interrogatory is no, were the bands rendered unfit by the manner in which Atlantic and Gulf Stevedores, Inc. performed the work of unloading the ship?

Answer yes or no.

(6) If your answer to the second interrogatory is no, did the manner in which Atlantic and Gulf Stevedores, Inc. performed the work of unloading the ship substantially contribute to the injuries of the plaintiff, Leighton Beard?

Answer yes or no.

(7) Was there any negligence on the part of Atlantic and Gulf Stevedores, Inc.?

Answer yes or no.

(8) Could Atlantic and Gulf Stevedores, Inc. perform the unloading of the ship in a reasonably safe manner by the use of some device other than the hooks or by the use of the hooks in conjunction with the metal bands?

Answer yes or no.

(9) In what amount, if any, did you assess the damages to be awarded to the plaintiff?

KRUSEN, EVANS & SHAW,

By

Attorneys for Defendants.

DEFENDANTS' POINTS FOR CHARGE.

Defendants above named respectfully request Your Honorable Court to charge the jury as follows:

1. Under all the evidence, you must return a verdict in favor of the defendant, The City Line, Ltd., and against the plaintiff.

2. Under all the evidence, you must return a verdict in favor of the defendant, Ellerman Lines, Ltd., and against the plaintiff.

3. If you should return a verdict in favor of plaintiff and against the defendants, or either of them, then under all the evidence you must return a verdict in favor of the defendants and against the third party defendant, Atlantic & Gulf Stevedores, Inc.

4. Although shipowners are held to a strict degree of diligence, seaworthiness does not require absolute perfection, nor are shipowners held to the duty of furnishing appliances having the highest known degree of safety. It is sufficient if the equipment be that which is reasonably fit and safe for its purpose and reasonably adequate to the place and occasion where used. *Nunes v. Farrell Lines,* 227 F. 2d, 619, 622 (1955), quoting with approval from *The Tawmie,* 80 F. 2d 792, 793.

5. If the vessel and equipment were reasonably safe and suitable, the shipowner's obligation was performed, even though there may have been some other equipment more modern or more perfect in some detail. *Doucette v. Vincent,* 194 F. 2d 834, 838.

6. The negligence which is charged against Ellerman Lines, Ltd., in this case is that it failed to stop a method of discharging cargo which one of the ship's officers considered unsafe. I charge you, however, that if you find that the method of discharging cargo adopted by Atlantic

& Gulf Stevedores, Inc. at the time of the accident in this case was reasonably safe and proper under all of the circumstances, then you may not base a verdict in favor of the plaintiff upon negligence as I have defined it to you.

7. If, on the other hand, you find in favor of the plaintiff and against the defendant, and the basis of your finding is that the method of discharging was not reasonably safe and proper under the circumstances existing at the time of the accident, then I charge you that under these circumstances you must further find a verdict in favor of the defendant and against Atlantic & Gulf Stevedores, Inc.

8. It is the plaintiff's burden to establish every essential element of his case by a fair preponderance of the evidence. So far as the plaintiff's claim based upon unseaworthiness is concerned this means that plaintiff must establish by a fair preponderance of the evidence the cause for the breaking of the band. If he has failed to do so, then you need not consider further the plaintiff's claim based upon unseaworthiness and you must find in favor of the defendant on that issue.

9. If the cause of the breaking of the band has not been established by the evidence, it is not your duty and in fact it would be improper for you to speculate as to what the cause of the breaking might have been.

10. Although you are permitted to draw inferences from facts which you find to have been proved, you are not required to do so and you may find that the evidence presented is not sufficient to enable you to draw any legitimate inference whatsoever as to the cause of the accident.

11. An inference may be defined as a logical conclusion which may be drawn from facts which you find to have been established by the evidence.

12. If you see fit to draw inferences from facts which you find to have been established, you should use the most reasonable inference in reaching your conclusion.

13. The mere fact that a band broke, or that the accident happened, or both of these facts taken together, may not be the basis for a finding by you of either negligence or unseaworthiness.

14. If you find that Mr. Beard's accident was due to the improper handling of adequate and safe appliances by the employees of Atlantic & Gulf Stevedores, Inc., then there is absolutely no liability on the ship and your verdict should be in favor of the defendant, and against the plaintiff.

15. According to the plaintiff's evidence, two longshoremen employed by Atlantic & Gulf Stevedores, Inc. inserted the hooks under the bands of the particular draft of bales which was involved in this accident. These men were William Jennifer and George Hudson. Plaintiff produced the testimony of Jennifer, but the testimony of George Hudson was not produced. In these circumstances, it is proper for you to consider whether it would have been natural for either the plaintiff or for Atlantic & Gulf Stevedores, Inc. to have produced Mr. Hudson as a witness if the facts known by Mr. Hudson had been favorable to either of these parties. If you so conclude, and if the failure to call Mr. Hudson as a witness has not been satisfactorily explained, you may infer that if he had been called as a witness, his testimony would have been unfavorable to the party whom you would naturally have expected to produce his testimony.

KRUSEN, EVANS & SHAW

By

Attorneys for Defendants.

INTERROGATORIES TO THE JURY.

(1) Was unseaworthiness a substantial factor in causing the injuries to the plaintiff.

yes or no.

(2) Was there negligence on the part of Ellerman Lines, Ltd. which was a substantial factor in causing injuries to the plaintiff.

yes or no.

(3) In what amount, if any, did you assess the damages to be awarded the plaintiff.

(4) If you have answered yes to interrogatories 1 or 2, did the fault of Ellerman arise out of any failure on the part of Atlantic & Gulf Stevedores, Inc. to do its work with the utmost care.

yes or no.

(5) Did Atlantic & Gulf perform its work in compliance with the terms of its contract.

yes or no.

(6) If you have answered "no" to interrogatory No. 5, did Atlantic & Gulf's breach of this contract contribute substantially to the injuries to the plaintiff.

yes or no.

(1193) **CHARGE OF THE COURT.**

GANEY, J.

Ladies and gentlemen of the jury: We come now to the close of a rather long drama. There has been a lot of delay, because this is a very busy Court. We had had a lot of recesses, but in every recess I have been seeing lawyers and trying to catch up with things, and I don't want you to think counsel are to blame in any wise. Sometimes there have been long examinations and cross-examinations of witnesses, but it is (1193) difficult to draw the line, especially with experts. The Court not being an expert, and having forgotten most of his physics, thought probably the best thing to do was to have the jury get the whole picture as both experts saw it.

You are the judges of the facts and of the credibility of the witnesses, and I want you to follow me closely because this is an important case. I want you to take the law from the Court as the best evidence of what the law is. If I am wrong, I will be corrected. I don't want you to take it from counsel—any or either of the three—I want you to follow me as closely as you can, because we have to straighten out certain basic differences with respect to the law.

Leighton Beard sued the Ellerman Lines and The City Line, Limited, in this action, and he alleged two causes of action, unseaworthiness and negligence. Each action has certain peculiarities which I shall advert to.

Ellerman Lines and The City Line then brought suit against the Atlantic & Gulf Stevedores, Incorporated, and they said, "If there is any liability, in effect we deny it; but if there is any liability in effect, the Atlantic & Gulf Stevedores Company must pay for it.

Now, there is a great deal of difference between the two actions, and that is why I want you to follow me care-
(1194) fully. I want you to know that in the maritime law

unseaworthiness is a word of art. It does not mean that the ship leaks or that there is a possibility of its foundering. As has been explained to you, unseaworthiness means that the cargo—it can be cargo—or the ship's equipment is not reasonably fit for the purpose for which it is intended; so the focal point of your inquiry with respect to unseaworthiness is to determine whether or not this band was reasonably fit for the purpose for which it was intended.

In the maritime law when a stevedoring company comes on board a ship, the vessel, the master of the ship, the owners of the ship, are still in control; they do not relinquish control by having a stevedoring firm come upon it. They are in the same capacity, the longshoremen, for that purpose, as a member of the crew would be.

The doctrine of unseaworthiness eventuated from the hazardous calling of the sea, and it has given to crewmen this rule of law which is an insurer's liability. It is not bounded by any conceptions of negligence whatsoever; therefore, the master of the ship, the owner of the ship, owes a certain duty to a longshoreman when he comes upon it. He owes to him a safe place to work, equipment that is reasonably fit for the purpose for which it was intended, and that is a non-delegable duty which the owner of the ship has with (1195) respect to longshoremen in this case.

Your factual inquiry concerns itself preliminarily with two causes of action. The first cause of action is based on negligence, on fault, or on unseaworthiness; the action against the shipping company is an action in tort, and the plaintiff alleges that the shipping company had an unseaworthy vessel and that it was negligent in certain aspects which I shall advert to later.

In the second cause of action in which the defendant shipping companies sue the Atlantic & Gulf Stevedores is different, because that is an action in contract. The duties are different, the obligations which the shipping company owe to the seamen are different than that which the Atlantic & Gulf Stevedores owe to the shipping companies in

the second action, because the second action arises in contract, and the first action arises in tort.

You do not come to the second cause of action until you have disposed of the first. The first cause of action is Beard against Ellerman Lines and The City Line. If you find that there was no negligence, there was no unseaworthiness, then your duty is ended; then the defendant is not liable, and therefore the Atlantic & Gulf Stevedores are not liable. They are not sued jointly, as we have tried to explain to you. The Atlantic & Gulf Stevedores' liability, if (1196) any, only comes into play when a verdict has been fastened upon the defendant shipping companies.

The plaintiff here has two strings to his bow: He alleges unseaworthiness of the vessel, and he alleges that the shipping company was negligent. The plaintiff has a certain burden before he can ask a verdict at your hands, and that burden is that he must prove to you by a fair preponderance of the evidence that the vessel was unseaworthy or that the vessel, those in charge of the vessel, the defendants, were negligent. By the fair preponderance of the evidence we mean the fair weight of the evidence. We ask ourselves, Is the plaintiff's story more probably true than false? That is the criterion by which we measure whether or not the plaintiff has made out a case against the defendant, the Ellerman Steamship Company.

We will take the first allegation of the plaintiff against the steamship company. The plaintiff says that the defendant maintained an unseaworthy ship; he says that the appliances and the equipment which were used to discharge this ship were not reasonably fit for the purpose for which they were intended; he says that in the discharge of this cargo a dangerous situation obtained in that the bands that were on the cargo were not reasonably fit for the purpose for which they were intended, to wit, the discharge or un- (1197) loading of the cargo; that while the bands came with the bales of burlap, long usage and custom had caused the insertion of hooks under the bands, after

which they were pulled out of stow to the square of the hatch and then raised up. The plaintiff says that those bands were not reasonably fit for that purpose. He says that this band broke by reason of the fact that it was not a sufficient band to unload cargo; that the shipping company should have known it; that they had done this for years, knew that this method of operation was in force and that therefore they created an unseaworthy condition on board this vessel. I shall not advert in detail to the evidence, but briefly that is the plaintiff's contention with regard to the unseaworthiness of the ship.

That is an insurer's liability. I do not want to be repetitious, but I want you to know that this doctrine of the law is not bounded by any conception of negligence. It makes no difference that by reasonable inspection the ship could not have discovered the defect, if there was one. It holds that whenever equipment brought on board a ship by longshoremen and used by them in this manner, is defective, and that defect is a proximate cause of the injury of which a person complains, then the ship is unseaworthy. They do not have to be negligent in the use of it; they do not have to be warned about it; they do not have to know whether there is a defect (1198) in it. The steamship company is bound by that strict rule which the maritime law imposes on them in the nature of the doctrine of unseaworthiness.

The defendants say, "We were not unseaworthy. In the discharge of this cargo it was a normal operation. There was no unseaworthiness about it. We were using stevedores, and we say," as I gather from the defendants' case, "that the negligence of the stevedores was the cause of the accident; that it was a proximate cause of this accident; not the unseaworthiness of the bands."

Now, their negligence in working with these bands, if there was any, is not a cause of unseaworthiness. It does not make for the unseaworthiness of the ship. Don't misunderstand me. But they say in effect that it was not any

unseaworthiness in the bands; it was totally the negligence of Atlantic & Gulf Stevedores.

The question of unseaworthiness runs the gamut of all the testimony; you have heard experts on both sides, whose testimony I will not advert to. You have heard the testimony of all of the witnesses, including that of the individual who put the hook in the bale, who told how these bales were discharged, how they were brought to the center of the hatch, the square of the hatch; how they were then brought up from the square of the hatch, up to the deck, (1199) and that it was while en route, after it had got up a certain distance, I think 4 or 5 feet from the coaming, the bands broke and the bale, one of them anyway, fell down, struck a bale which was intended for New York delivery, and rolled some number of feet, 8 or 10 or 12 feet, and struck the plaintiff and injured him, cause the eventual loss of his leg.

Now, if you find that the bands on this bale which fell into this hold, if you so find that it did fall into the hold—although I do not think there is any contradiction—caused him to be injured, and that this rendered the cargo unsafe for the longshoremen to handle, or if you find that the bands of the bale were defective, were inadequate, or insufficient, by reason of that fact, or that it was a proximate cause of the plaintiff's injury, then you might find the defendants liable under the doctrine of unseaworthiness.

Over against that you have to take the defendants' side of the case, and you measure it, and you determine whether or not on the doctrine of unseaworthiness the plaintiff has met the burden which is on him to prove to you by the fair preponderance of the evidence that the vessel was unseaworthy and that this unseaworthiness was a proximate cause of the injury.

While they are held to this strict liability, unseaworthiness does not mean that they must provide perfect (1200) equipment; it only means that the equipment that they use should be reasonably fit for the purpose for which it was

intended. That is the classic phrase in the determination of whether this band was unseaworthy, whether this method of unloading cargo by the use of these bands, and hoisting it out, whether the putting of the hooks into the bands was a reasonable method, and whether or not that method was reasonably fit and adequate for the purpose. Was that the intendment of the bands, that they were put on the bales to be lifted out of the hold by means of hooks being inserted under them?

The plaintiff says to you, "Yes, that has been the course of unloading bales of burlap for many, many years." The defendant says to you, "They might have used a safer method, a better method. They might have tried using slings," and presented the testimony of Dr. Grosvenor, his expert, particularly when called in rebuttal, to support him in the contention that these bands were not unseaworthy.

You next go to the second string of the plaintiff's bow, that if this vessel was not unseaworthy, that if the discharging of this cargo, the lifting by these bands, did not create an unseaworthy condition, still was this defendant company negligent?

What is negligence? Negligence is the failure to do something which a reasonably prudent person would have (1201) done under the circumstances, or the doing of something which a reasonably prudent person would not have done under the circumstances.

Was the shipping company negligent? The plaintiff says, "Yes, they were negligent"; that they did not provide a safe place for this plaintiff who was injured to work; that their method of stowage, their method of pulling out this cargo, created a dangerous condition which provided a hazard to him working there. He buttresses that by saying that the chief officer of the shipping company, who was on the deck looking over the hatchway, in the course of his conversation with a man whom the plaintiff identifies as being a longshoreman of some authority—and you will

have to remember that testimony and determine yourself what was said and to whom—but as I recall it, he said that this was a dangerous method of discharge, the way this cargo was coming out, and it was being done too fast; and the plaintiff says that that is some evidence of whether or not the shipping company was negligent, by virtue of this statement of the chief officer, and that it was his duty not only to warn them, but to stop the operation, because in not stopping it he violated a duty which the shipping company owes to the injured plaintiff of providing a safe and reasonable method for the discharge of the cargo; he could not stay there and see and know that this (1202) cargo was being discharged in a dangerous way.

He says further that it was negligence on the part of the steamship company to keep in a portion of the square of the hatch some New York cargo which was there; that that cargo either should have been shifted or it should have put out of the way; that it was a contributing cause to the injury to the plaintiff, because when the bale fell it struck a bale of burlap intended for delivery in New York, and by virtue of hitting it, it tumbled around and fell end over end, hit the plaintiff and injured him as you have heard it described. Those are, I think, the major points of the plaintiff's case on the theory of negligence.

Did the shipping company do something which a reasonably prudent person would not have done? Did they fail to do something which a reasonably prudent person would have done? There you run the gamut of the evidence, and you make that decision.

I have been discussing the plaintiff's side of the case. The defendant says, "We were not negligent; it was as much the duty of this stevedoring company who were down there to move that around; they saw the situation that was obtaining there; they were there during the actual operation; the boom was not placed over the square of the hatch; it was placed over the section of the hatch which was free of New York (1203) cargo."

It seems to me that is an important phase, although I do not want to emphasize one phase of the case any more than the other, but you will have to determine whether there was negligence in the leaving of that New York part of that cargo in the place where it was, and whether it was an interference, as the plaintiff claims, with his condition of safety.

On the other hand, the defendant says, "This was not our job; the shifting should have been done by the stevedores. We, the shipping company, were not negligent in failing to get it out of the way."

The plaintiff asserts here and asks you to believe and to weigh in the balance toward meeting the burden which he has to establish by the fair preponderance of the evidence that this officer was there but did not stop the operation. The defendant says, "If you find, no matter what the officer says, that this was being unloaded in a reasonably safe manner then we were not liable; it may well be that the Atlantic & Gulf Stevedores are liable, but we were not liable."

It is the plaintiff's burden to establish every essential element of his case by a fair preponderance of the evidence. So far as the plaintiff's claim based upon (1204) unseaworthiness is concerned this means that plaintiff must establish by a fair preponderance of the evidence the cause for the breaking of the band. If he has failed to so do, then you need not consider further the plaintiff's claim based upon unseaworthiness and you must find in favor of the plaintiff on that issue.

That is right; the burden of proving by the fair preponderance of the evidence is on the plaintiff on the doctrine of unseaworthiness, in the method in which I defined unseaworthiness to you, and I won't repeat it, but it must be a proximate cause of the injury.

You may draw certain inferences from facts as they have been proven to you, but you must draw the most reasonable inferences you can from those proven facts. I say

that with respect to the testimony which you have heard from the experts. The band is not here. I don't know where it is. I don't know that anybody knows where it is, but at least we haven't got it. We don't know what it looked like. The experts have made certain assumptions; there have been certain cases stated to them; they have been given the question of tensile strength, ductility, elasticity, breaking point, yield point, and they are pertinent to the case. They concern themselves with facts which can be helpful to you in the determination of the issue which is yours, and you (1205) consider them in the light of whatever you think they are worth. You consider the competency of both men who testified, again taking into consideration that no one knows exactly what happened when that band broke, nor do we know what the initial tension was in the band when it was being lifted out of the hold of the ship; but there is other evidence there to which you can give consideration and whatever weight you feel is necessary in the determination of the issue whether or not you think the plaintiff has met the burden which lies upon him.

If you find that either the ship was unseaworthy or that the bands were not reasonably fit for the purpose intended in the discharge of this cargo from the ship, or if you find that the defendant was negligent, then you go on to the consideration of damages in this case. If, however, you find that the defendant was not negligent, if you find that no unseaworthy condition obtained, then your duty is ended, and you return a verdict for the defendant, and you go no further with respect to the other cause of action against the Atlantic & Gulf Stevedores. I say that because you must make that judgment before you go on to any question of damages, as to whether or not plaintiff has met his burden under either one of those two strings to his bow.

With respect to the question of damages, I (1206) think that everyone will agree that this was a rather serious injury. This man was struck with considerable force, he was knocked down, his face was bloody, he was carried

out on a tray, and he was brought to the hospital where his leg was amputated once, and then it had to be amputated again, and he is now minus that leg.

There are certain medical and wage losses which can fairly reasonably be calculated. I don't want you to take it as proof because I say it; you are to determine whether or not these figures which have been given you are proven. The hospital and medical bills as I have them are $4,409.83, his loss of wages to date is $12,001, making a total of $16,411.69 which he is out of pocket today. In addition to that you have pain and suffering. I cannot give you any yardstick for the pain and suffering that he has incurred to date; you will have to draw on your own reservoir of human experience to make compensable that pain and suffering from the moment he was injured in the hold of that ship right down to the present day complaints of pain. It was more intense at some periods of time than others, and you will have to look back at the testimony which you have as to just what that pain and suffering was for which he is to be compensated.

What will be his loss of wages in the future? You figure out his life expectancy, how long he will live. You (1207) look at him; you know the nature of his education, training, background; you know something of his environment; and you determine how long he will live, and then out of that life expectancy which he has you will carve out what his loss of wages will be during that period had it not been for the loss of this leg. He cannot just sit around and do nothing and say, "I have had my leg off; I won't work"; he must mitigate his damages. I certainly think he cannot go back to work as a longshoreman, but there are sedentary occupations that are open to him, and with regard to that you must take into consideration his age, his education, his general background and environment, and what he can do, and you will have to determine what his loss of earning power would be were it not for the loss of his limb over the period of years that represents his work-

ing expectancy, carved out of his life expectancy. One is not always able to earn the same amount of money as he grows older. His condition may be such that he is not able to get a job which would be one of security, which would last for a long period of time during his working expectancy. The reverse is possible, however I do not venture an opinion one way or the other, but I think you ought to take it into consideration. You will say how much he would lose per year over a period of so many years.

I will give you a ludicrous example. Suppose (1208) his working expectancy, his ability to work and earn money, would extend over ten years and that he would earn a dollar a year. You would not give him ten times one, ten dollars now, because ten dollars in hand paid now is something you can do more with than if you get it over a period of ten years; therefore, you reduce it to its present worth. I know that is a difficult job for you to do, but I think there was given to you by Mr. Borowsky the value of a dollar at 3 per cent for some twenty-three years, or whatever it was, and you are to take his life expectancy and carve out of it the number of years that he would have worked, and determine what he would have earned less what he can earn by reason of the loss of this leg. As I say, he cannot sit back and do nothing—unless you find that he will never be able to work—and if you find that he will never be able to work, then you would give him the full amount; but if you feel that he can do some sedentary occupation you must mitigate what he would have lost as a longshoreman over against what he would earn over the number of years you find he would be able to work.

Then you determine what pain and suffering he would have in the future. He has an artificial leg, and he will have, he says, and the doctors say, some pain and suffering. How long will that last? You will have to evaluate that. You do not reduce it to its present value, but you still determine (1209) what that pain and suffering will be.

He has a disfigurement and an impairment to his body by the loss of his leg. That is a compensable item as is the

loss of certain functions which he can no longer perform, minus a leg, in the everyday work-a-day world. These are factors that you should take into consideration in determining what he should be compensated for. You will add those all up and you come to X dollars, and you say that is the amount of money which we deem will compensate him for his hospital bill, his loss of wages present and past, his pain and suffering present and past, and whatever figure you give for disfigurement and impairment of the body and loss of function in that leg which prevents his doing things in life which the ordinary person can do.

You do not come to that question of damages unless you have found for the plaintiff, and it may well be that you may decide that there is no liability here on the part of the defendant, and it is equally your job to say that the plaintiff has not met his burden, that the plaintiff cannot recover, either on the doctrine of unseaworthiness or on the doctrine of negligence, as I have defined them to you; and, of course, if you come to that conclusion you render a verdict for the defendant. Because I give you such instruction I do not want you to feel that I have any thoughts one way or the (1210) other. I must so instruct you because I have to go to the second cause of action, which is the action by Ellerman Company against Atlantic & Gulf Stevedores. This action arises out of contract. Ellerman Lines had a contract with the Atlantic & Gulf Stevedores, and that contract is before you, and you will read it and see just what the Atlantic & Gulf Stevedores contracted to do.

Under one portion of that contract they were supposed to unload and discharge this cargo of burlap with the utmost care. There are other portions of the contract that you may advert to; the whole contract is in evidence. In this action by Ellerman Lines and The City Line against Atlantic & Gulf Stevedores whom the defendants brought in, the focal point of your inquiry is whether there was any breach of that contract, whether there was a sub-standard performance in which there was foreseeability that injury

might occur to someone in the breach of that contract, and while there is a tort measurement of that standard it nevertheless is still a contract action, and the third-party defendant, Atlantic & Gulf Stevedores, are only responsible for the breach of that contract.

Ellerman Steamship Company says to you that if there is any liability which we owe to Mr. Beard that condition was created by Atlantic & Gulf Stevedores. That is your criterion: Did the Atlantic & Gulf Stevedores create the (1211) condition which made Ellerman Lines and The City Line responsible to the plaintiff? There again you have to run the whole gamut of facts in the case. You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. Did they breach that contract to do it in a workmanlike manner with the utmost care? The steamship company says, "Yes, they did. They breached that contract. They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants."

In other words, did the liability of the Ellerman Lines, Limited, and The City Line, Limited, arise out of any failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations? If you answer that yes, then your next inquiry is: Was breach of this contract by Atlantic and Gulf Stevedores a substantial factor in bringing about the injuries to the plaintiff?

The Atlantic & Gulf Stevedores argued to you, through Mr. Marshall, the many reasons why in his opinion there was no breach of this contract. I am not going to rehearse the testimony in this case on any side; I am just going to (1212) pose to you the law which you shall make applicable to the facts in the case as you find them. If you find that Atlantic & Gulf Stevedores did breach their contract

with the defendant, and that they were the contributing cause of the liability which they incurred to the plaintiff, then you should render a verdict in the amount, same amount, which you rendered against the defendant, and you should render that against the third-party defendant, Atlantic & Gulf Stevedores.

You must answer the question, was that a reasonable and safe method of operation for the discharge of that cargo? Taking into consideration that it had been done over a period of years, that it was a usual and accepted method in various places, you will have to examine into the nature of the application of the hook to the bale, and you will take into consideration the testimony of both experts, and both counsel argued to you in their interpretation of the testimony the results that they feel favor their side.

The Atlantic & Gulf Stevedores cannot, however, plead as a defense in the suit of the steamship companies against them that Quinn or that the companies knew it was a dangerous situation; they cannot use that as a defense against the claim of Mr. Byrne in the Ellerman Company case against them. But they do say that they did everything within their power, and you have heard them argue it to you as you have (1213) heard the evidence, which would render them not liable to the plaintiff in this case.

Certain interogatories are going out to you, and they are to be answered by you. The first interrogatory reads:

"(1) Was unseaworthiness a substantial factor in causing the injuries to the plaintiff?"

I used "proximate cause." We take up seaworthiness first, seaworthiness or unseaworthiness. Was unseaworthiness a substantial factor in causing the injuries to the plaintiff? And you answer that yes or no, as your own individual judgments dictate.

The second string to the defendant's bow is:

"(2) Was there negligence on the part of Ellerman Lines, Limited, which was a substantial factor in causing injuries to the plaintiff?"

In other words, was unseaworthiness the cause of the accident, or was negligence the cause of the accident, or neither? You answer yes or no as you find the evidence warrants in accordance with your judgment.

And then you say:

"(3) In what amount, if any, did you assess the damages to be awarded the plaintiff, in the event that you find that there was either negligence or unseaworthiness?

(1214) "(4) If you have answered yes to Interrogatories 1 or 2, did the fault of Ellerman Lines, Limited, and The City Line, Limited, arise out of any failure on the part of Atlantic & Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation?"

In other words, if you find liability on the part of the defendant, did that liability arise out of any violation of the contractual obligation which the Atlantic & Gulf Stevedores owed to the shipping company under the terms of that contract which will go out with you?

You may answer yes or no, but if you answer yes, then you have to go on to the next interrogatory which is:

"(5) If you have answered yes to Interrogatory No. 4, was Atlantic & Gulf Stevedores, Inc.'s breach of this contract a substantial factor in bringing about the injuries to the plaintiff?"

That is the case as I see it, and it is a complicated case. I now ask counsel if they wish to say anything, and I ask you to listen carefully.

Mr. Borowsky: If Your Honor please, I ask you to charge the jury that even if it was the stevedore's equipment involved in this case, the warranty of seaworthiness applies to that, and if they find that the hooks, for (1215) example, were not of the proper nature, that in no way diminishes the obligation of the shipowner to the longshoreman on the grounds of unseaworthiness.

The Court: I so charge.

Mr. Borowsky: I ask you to charge the jury that it makes no difference what the contract is between the Ellerman Lines and the Atlantic & Gulf Stevedores as it affects the plaintiff, because he is not a party to the contract and his rights are governed by his relation to the vessel and he is performing work for the benefit of the vessel.

The Court: I think that is correct. I so charge you that the contractual relation between the shipping company and Atlantic & Gulf Stevedores is a contractual relation obtaining between them and has no bearing on the tort action which is the action between the plaintiff and the shipping company defendants.

Mr. Borowsky: I ask you to charge the jury, sir that the issue in this case is not all the bands on the ship, but the bands on this particular bale. I think you gave the jury the impression that I was questioning the unseaworthiness of the bands on the bales that did not break. I am only questioning the particular bands on the particular bale, which are inadequate.

The Court: Well, that is correct; it is only (1216) the bands of this bale; but the evidence with respect to other bands, the testimony of the experts, you will take into consideration, as it relates to tension, ductility, yield point, breaking point.

Mr. Borowsky: I ask you to charge the jury, sir, that we are claiming recovery on both grounds. Your Honor has kept, alluding to grounds for recovery in the alternative; we claim both unseaworthiness and negligence.

The Court: If I did, you are right; they are claiming on grounds of unseaworthiness and of negligence.

Mr. Borowsky: If Your Honor please, I take an exception and ask Your Honor to clear up this question of the obligation on the part of the plaintiff to show the cause of a condition which is unfit for the purpose for which it is intended, and it is my understanding of the law that we do

not have to show the cause; we merely have to show that the appliance is unfit for the purpose for which it was intended, because cause goes to negligence; we don't have to prove that there was any cause for this particular thing.

The Court: That is right to this extent, on the doctrine of unseaworthiness. When I used "cause" I meant that unseaworthiness must be a proximate cause of the injury, and I used it in that sense. If you find it is unseaworthy, that alone does not fasten responsibility; that unseaworthiness must (1217) be a proximate cause of the plaintiff's injury.

Mr. Borowsky: I ask Your Honor to charge on the concurrence of cause. Your Honor has omitted the point made in No. 11 of the plaintiff's suggestions for—

The Court: Yes, I think I did. There may be two causes; there may be more causes; there may be concurrent causes; there may have resulted here both unseaworthiness and negligence; or there may have been negligence in one respect and negligence in another respect, and both together might combine to produce a proximate cause or a substantial factor in the injury.

Mr. Borowsky: That is not the context in which I want to call it to Your Honor's attention. It is my understanding that if there is concurrence of negligence on the part of the ship and on the part of the Atlantic & Gulf Stevedores which results in injury to the plaintiff, and each one of those causes is a substantial factor in causing his injury, it does not relieve Ellerman Lines, whom we have sued, one whit because there happens to be another party who was concurrently negligent.

The Court: That is right, if that is a substantial factor in causing the injury to the plaintiff, that negligence.

Mr. Borowsky: And it also applies to the combina-
(1218) tion of unseaworthiness and negligence. If the jury should find that there is unseaworthiness in this case which

combines with the negligence of Atlantic & Gulf Stevedores, and both factors are substantial factors in causing injury to the plaintiff, then in that case plaintiff's right is not defeated against Ellerman merely because there was also negligence on the part of Atlantic & Gulf.

The Court: I so charge. That is as I understand the law.

Mr. Borowsky: Your Honor has misconstrued the argument which I made to the jury on these New York bales, and that I would like to clear up. I did not argue that the cargo should have been shifted, because that would have created the same danger that applied in taking out the Philadelphia bales. I argued that it should not be stowed in the manner which would require either stowage to be removed.

The Court: I suppose that is your contention; I may have misconstrued it.

Mr. Borowsky: I also feel that Your Honor has omitted an important element of damages, and that is deprivation of life's pleasure. I think there is a distinction between the loss of a limb as it obtains to the functioning of the body, or pain and suffering, and the deprivation of the ability of a person to pursue his course of life and the (1219) pursuit of happiness, and I feel that that is an element of damage which should be brought home to the jury.

The Court: I think I did. I don't know what further I can add.

All right, Mr. Byrne.

Mr. Byrne: I think I will take my exceptions at side bar.

The Court: All right.

(Conference at side bar.)

Mr. Byrne: If the Court please, you have said that there is an insurer's liability here on the part of the ship-

owner. I submit that that is erroneous and ask that you correct it. There is no insurer's liability here. The decisions discussing the question of unseaworthiness do not say it is an insurer's liability; they say it is somewhat akin to an insurer's liability, but the fact of unseaworthiness must first be established.

The Court: Oh, certainly.

Mr. Borowsky: Your Honor left out a point I would like to call Your Honor's attention to, and that is the inference that if work is being done in the normal way without any evidence that any abnormal procedure took place, that a logical inference is that the appliances that failed are inadequate under those circumstances. All the evidence in this (1220) case, Your Honor, is that here was the discharge of these bales in a manner which was the normal, regular way, and something happened which should not have happened, and from that an inference of negligence could arise that it was a negligence case, but certainly negligence and unseaworthiness can arise, and Your Honor has omitted that in his charge.

Mr. Byrne: Your Honor, may I ask if Mr. Borowsky is now taking an additional exception.

The Court: I think he is.

Mr. Borowsky: Yes, this is an additional exception.

Mr. Byrne: Go ahead and finish. Are you finished?

Mr. Borowsky: I want a reply.

Mr. Byrne: No, you don't have a right to reply to my exceptions, Mr. Borowsky.

If the Court please—

The Court: (To the jury) I want to clear up one thing. Mr. Borowsky has made an additional request to this Court, and it is this, that if you find that this means of discharge by which this cargo was taken out was a safe and proper means, by which the hooks were put to the bales

under the bands, and if you further find that this method of discharge or unloading of cargo was a normal and a safe (1221) and a reasonable method of discharge or unloading of the cargo, and this band broke, then you may infer that the band was defective, but you have to find, you must find, those situations which I have adverted to, that the means were safe and proper, that the method of discharge was a safe and a reasonable one, in its being taken out, its being hooked up, and its being brought out of the hold of the ship; and if you find both of those were safe and normal methods of discharge, reasonable methods of discharge, that the hooks were reasonably fit for the purpose intended, and the band broke, you may infer that there was some defect in the band.

Mr. Byrne: May I have an exception to that?

The Court: Yes. Now, go ahead.

Mr. Byrne: Mr. Borowsky, are you finished?

Mr. Borowsky: I have finished with that thought.

The Court: We have got to stop sometime; let us hear Mr. Byrne.

Mr. Byrne: Now, if Your Honor please, I tried to make a point before that you charged that there was an insurer's liability on the part of the ship. I take exception to that.

The Court: I think they do use the word "akin." That is right.

(To the jury) I have said there was an insurer's (1222) liability here. In the context of what the law says unseaworthiness is, it is a liability akin to an insurer's liability, but first you have to find that it was unseaworthy.

Mr. Byrne: Your Honor has charged the jury, as I understand it, almost as a matter of law, that these bands were intended and put on these bales with the intent that they should be used in unloading the cargo. I take an exception to that. I don't think you can do that; I think that

is a matter which you must leave to the jury for its determination.

The Court: (To the jury) If I have left any impression with you that these bands were put on to unload cargo, I don't mean it that way. I only mean that these bands were on, and that for a number of years they were used that way. I do not say that they were put on for that purpose. I said to you that you may find that they were. I don't want you to think that I am saying that it is mandatory that you must find that these bands were used to have hooks put in them to discharge cargo.

You may have an exception.

Mr. Byrne: I request that you charge the jury that if they are unable to find that the reason the band broke was from some defect in the band other than any damage that might have been done to it by the method of discharging, (1223) then they may not fasten liability upon this shipowner on the ground of unseaworthiness.

The Court: I did not get that. Will the reporter read it.

(Mr. Byrne's request was read)

Mr. Byrne: I ask you to charge this jury that unless they can find affirmatively from the evidence that there was a defect in the band other than one due to an act or omission by Atlantic & Gulf in its unloading operation, they may not fasten liability upon Ellerman upon the ground of unseaworthiness.

The Court: In other words, you mean that nothing that Ellerman did to the band could in any wise contribute to its unseaworthiness? You have in mind the—

Mr. Byrne: I say that if the longshoremen by their method of work tore this band, which resulted in its ultimately breaking, we are not liable on the ground of unseaworthiness. I think that is the Joachim Fisser case.

Mr. Borowsky: I say to Your Honor that there could be concurrence, that if the band is used by the longshoremen in ordinary use and they cause it to be torn, that does not relieve a shipowner, if the jury should find that this is an unsafe band. In other words, unless it is the sole cause for the defect there can be concurrence in favor of (1224) the plaintiff.

Mr. Byrne: What I have in mind, Judge Ganey, is almost covered precisely by the language in the Feinman decision, that if the longshoremen took the equipment which was otherwise safe and by their method of operation brought about the accident or themselves created a situation that you could call unseaworthiness, the shipowner is not responsible. I can get the exact language of the Feinman decision.

The Court: I think that is right.

Mr. Borowsky: I do not agree that that is controlling. In the Grilles situation where a seaman took off a proper hatch board and replaced it in the wrong way—

The Court: You are way off the track. The Crumady case in our circuit has certainly thrown that out the window.

Mr. Borowsky: I don't think so, but I won't debate that with you. I think it is cast in terms that it was the sole cause, and I think you are omitting the fact that the jury might be misled into finding that the band was not altogether good and that the longshoremen might not have taken proper care under the circumstances, and there would be a concurrence of factors which I have summarized from the plaintiff's point of view. I think you have to cast it in terms of sole—

(1225) The Court: Wouldn't this be the question? If they find negligent conduct on the part of the longshoremen and that that negligence caused the band to break rather than unseaworthiness, the effect would be—

Mr. Byrne: I think I would agree with that except for the use of the word "negligence." There doesn't have to be negligence here. In other words, it is negligence of Atlantic and Gulf.

The Court: No, I am not talking about that. This must be in Borowsky's case against you. I don't want to mix them up here.

Mr. Byrne: No, I don't want to mix them up.

The Court: I think that is what I will say; that is about the best I can do.

(To the jury) Ladies and gentlemen, if you find in the plaintiff's case, Mr. Beard against the shipping companies, that that band broke by virtue of the negligent conduct of the longshoremen who were putting it together and pulling it out of stow and taking it up—if there is evidence to so substantiate that—if that negligent conduct was responsible for the break rather than unseaworthiness of the band; whether or not the negligent conduct of the longshoremen resulted in the breaking of the band. I think you have to ask yourself that on both sides of the question.

(1226) Mr. Borowsky: I ask for an exception.

Mr. Byrne: I don't think you quite finished your thought. If they so find, they may not find the defendant liable.

The Court: (To the jury) Yes, if you so find that that negligent conduct was such that it broke the band, rather than any unseaworthiness of the band, then you must find for the defendant shipping companies; but you have to make that finding in the light of all the circumstances, whether or not there was sufficient evidence that persuades you that that conduct of the longshoremen was responsible for the breaking of the band—not any unseaworthiness in the band itself.

Mr. Borowsky: May I have an exception?

The Court: Yes.

Mr. Marshall: I take exception too.

The Court: All right.

Mr. Byrne: Your Honor, I am about finished. I take exception to your statement in which you apparently confirm the plaintiff's contention—I think your language was that the plaintiff contends that the chief officer was under a duty to stop the work if he thought it was improper. I take exception to that and my view is that you made an inadvertent error. You were, I thought, reading a point on the burden of proof, and I thought that it should have wound up that "Your (1227) verdict must be for the defendant," but as it came out, you said, "Your verdict must be for the plaintiff."

(The reporter read as follows from the charge:)

"It is the plaintiff's burden to establish every essential element of his case by a fair preponderance of the evidence. So far as the plaintiff's claim based upon unseaworthiness is concerned this means that plaintiff must establish by a fair preponderance of the evidence the cause for the breaking of the hand. If he has failed to do so, then you need not consider further the plaintiff's claim of unseaworthiness and you must find in favor of the plaintiff.")

The Court: That should be "defendant."

Mr. Byrne: Yes. There is one other thing. I take exception to your charge in substance that failure to use a reasonably safe method of discharging cargo by, of course, Atlantic & Gulf, is negligence on the part of Ellerman Lines, and I take exception to that.

The Court: If I did, it is the unreasonableness—not the reasonableness of your doing it—it is the unreasonableness of the third-party defendant, whether it was a reasonably safe method of discharge. Did I say that you—

Mr. Byrne: I thought you laid the failure to use a reasonably safe method of discharge at our door. In (1228)

other words, you said, "This is the plaintiff's contention that that is negligent," and I take exception.

Mr. Marshall: If there is that in the record I think you can make it clear in one sentence and you may as well do it.

The Court: (To the jury) I will say to you that the question of whether Atlantic & Gulf Stevedores are liable to the plaintiff shipping company in the second action is dependent upon the breach of the contract which, as I said, obtained between Atlantic & Gulf Stevedores and the defendant. Whether or not there was a breach of that contract, what you look to decide is whether or not there was reasonably safe discharge of that cargo by the Atlantic & Gulf Stevedores. If it was not, if it was not done in a reasonably safe manner, then Atlantic & Gulf Stevedores would breach their warranty under the contract. If there was sub-standard performance on which it was foreseeable by them that some injury might happen or eventuate, then Atlantic & Gulf Stevedores would be responsible to the plaintiff shipping company.

Mr. Byrne: My conception was that you said that that would be negligence on us.

The Court: (To the jury) If I said that that would be negligence on the part of the shipping company I was wrong: I retract it. I want to follow the instruction that (1229) I have just given you. I may have so said.

Mr. Byrne: That is all.

Mr. Marshall: I take exception to Your Honor's refusal to charge on my Point No. 1.

Mr. Byrne: I think you have an automatic exception.

The Court: Yes, but that is all right.

Mr. Marshall: I will take exception as to 2, 3, 5 and 6.

The Court: Wait a minute; I covered that, I thought.

Mr. Marshall: All right, 5, 6, 7, 8, 9.

The Court: I thought I covered these. I don't want to reiterate, but I thought I covered all of them. I agree with them.

(To the jury) Ladies and gentlemen, the third-party defendant asks me to charge that if you find that the plaintiff's injuries, Beard's, were not caused by the negligence of the employees of Atlantic & Gulf Stevedores, Incorporated, then your verdict must be in favor of Atlantic & Gulf Stevedores; in other words, if you find that as between the shipping company and the third-party defendant that the plaintiff's injuries were not caused by negligence of the employees of Atlantic & Gulf Stevedores, then your verdict (1230) must be in their favor.

Mr. Byrne: I take exception to that because negligence has nothing to do with my case. I thought we decided that our case was one in contract. When you read that, I think you are getting into conflict right in your charge.

The Court: Maybe I am.

(To the jury) As I said to you, the relationship that obtains between the shipping company and the Atlantic & Gulf Stevedores is based upon contract, but you measure the breach of that contract in terms of tort; you do not consider it and construe it as a tort action; it is still a contractual action; and you determine whether or not the breach of that contract was a substantial cause for the injury which the plaintiff received.

I think maybe we had better strike out 5. That I have given to you.

Mr. Marshall: All right. I can now take exception.

Mr. Byrne: And I take exception to what Your Honor just said.

The Court: All right. 6, 7—I am going to read 7.

(To the jury) If you find that Atlantic & Gulf (1231) Stevedores, Mr. Marshall's client, was unloading the bales of burlap in a proper and safe manner, using a method that

was in accordance with the practice, customs, and usage of the Port of Philadelphia, and that that was not in violation of their breach of contract which obtained between them, then your verdict must be in favor of the Atlantic & Gulf Stevedores.

Mr. Byrne: May I have an exception to that, please, sir?

The Court: Yes, you may have your exception.

I think I have covered these.

Mr. Marshall: All right, I take exception to 8 and 9.

The Court: All right.

Mr. Borowsky: Your Honor, may I have exceptions where we asked for a directed verdict?

The Court: Yes—well, we reserve the point.

Mr. Byrne: Do I have an exception to all my written requests?

The Court: Yes indeed; all of them.

Mr. Byrne: I now ask you again to instruct the jury on the question of failure to produce the testimony of a witness who was a central actor.

The Court: No, I am going to deny that.

Mr. Byrne: Exception.

(1232) The Court: Yes.

Mr. Marshall: May I have a general exception to Your Honor's over-all charge?

The Court: No, you don't get that here; but I will give you an exception to all points.

(End of conference at side bar.)

The Court: Ladies and gentlemen, as you know, your verdict must be unanimous.

I now discharge the two alternate jurors with the thanks of the Court. They also serve who only stand and wait. Thank you very much.

Are all the exhibits here so that the jury may have them?

Mr. Marshall: I think counsel are agreed that the jury need not lug that big iron bar around, and I won't ask the court officer to do so. We will ask that all other exhibits go out.

The Court: All right, let the marshal be sworn.

(The marshal was sworn and the jury retired to begin its deliberations at 4:32 p. m., taking with them Exhibits P-1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, and 19. Defendants' Exhibits 1, 2, 3, 4, 5, 6A and 6B.

Exhibits 3D-1, 3D-2, 3D-3, 3D-4, 3D-5, 3D-6, 3D-7, 3D-8, 3D-9, 3D-10, 3D-11, 3D-12, and 3D-13.

(1233) The jury also took with them the interrogatories submitted by the Court.)

(The jury returned to the courtroom at 8:57 p.m.)

Present: The Court, counsel, and Mr. Comey, clerk.

The Clerk: Members of the jury, please rise.

Members of the jury, have you agreed upon your answers to the interrogatories?

The Foreman: Yes, we have.

The Clerk: What is your answer to Interrogatory No. 1: "Was unseaworthiness a substantial factor in causing the injuries to the plaintiff?"

The Foreman: Yes.

The Clerk: "Yes." What is your answer to Interrogatory No. 2 which reads as follows: "Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the plaintiff?"

The Foreman: Yes.

The Clerk: "Yes." What is your answer to Interrogatory No. 3 which reads as follows: "In what amount, if

any, did you assess the damages to be awarded the plaintiff?"

The Foreman: $100,000.

The Clerk: "$100,000." What is your answer to Interrogatory No. 4 which reads as follows: "If you have (1234) answered Yes to Interrogatories 1 or 2, did the fault of Ellerman Lines, Ltd., and The City Line, Ltd., arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation?"

The Foreman: No.

The Clerk: "No." What is your answer to Interrogatory No. 5 which reads as follows: "If you have answered Yes to Interrogatory No. 4 was Atlantic and Gulf Stevedores, Inc.'s breach of this contract a substantial factor in bringing about the injuries to the plaintiff?"

The Foreman: Yes, we did not answer it "Yes."

The Court: Just a moment. The last—let me see it, please.

The Foreman: If it is to be answered it would be "No."

The Court: Oh, I see. That is right.

The Clerk: The answer to No. 5 is "No"?

The Foreman: Yes, it would be if we had to answer it. I thought—

The Court: See, the answer to 4 was "No."

The Clerk: Yes, the answer to 4 was "No" so that 5 is not answered.

The Court: Well, did you answer "No" to 5?

The Foreman: We answered it. We answered (1235) it "No."

A Juror: Just in case you asked.

The Court: All right.

The Clerk: Shall I record the verdict?

The Court: Yes, record the verdict.

The Clerk: Members of the jury, hearken to your interrogatories as the Court hath recorded them. In the issue joined wherein Leighton Beard is plaintiff and Ellerman Lines, Ltd., and The City Line, Ltd., are defendants and third-party plaintiffs, and the Atlantic & Gulf Stevedores, Inc., is third-party defendant, you have answered certain interrogatories as follows:

Your answer to Interrogatory No. 1 is "Yes."

Your answer to Interrogatory No. 2 is "Yes."

Your answer to Interrogatory No. 3 is "$100,000."

Your answer to Interrogatory No. 4 is "No."

Your answer to Interrogatory No. 5 is "No," and so say you all.

The Foreman And Several Jurors: Yes, sir.

The Court: Thank you very much, ladies and gentlemen, for your services. You are excused for the term and your checks will be mailed to you in due course. Thank you very much.

(Adjourned at 9:03 p.m.)

JUDGMENT.

Before GANEY, *J.*

AND NOW, to wit: April 28th, 1958, in accordance with the Special Verdict of the Jury and the Direction of the Court, it is ORDERED that Judgment be and is hereby entered in favor of Plaintiff, Leighton Beard, and against the Defendants, Ellerman Lines, Ltd., and The City Line, Ltd., in the sum of One Hundred Thousand and 00/100 ($100,000.00) Dollars, together with costs, and it is

FURTHER ORDERED that Judgment be and is hereby entered in favor of Third-Party Defendant, Atlantic & Gulf Stevedores, Inc., and against Third-Party Plaintiffs, Ellerman Lines, Ltd. and The City Line, Ltd., with costs.

BY THE COURT:

ATTEST:

R. J. GREENWOOD,
Deputy Clerk.

ORDER.

(Filed April 4, 1960.)

Now, this 4th day of April, 1960, It is ORDERED by this Court that defendants', ELLERMAN LINES, LTD., and THE CITY LINE, LTD., motion to set aside the verdict in plaintiff's favor and to enter judgment in their favor, and their motion for a new trial be, and the same are hereby, denied.[1]

/s/ J. CULLEN GANEY,
Ch. J.

1. Reddick v. McAllister Lighterage Line, Inc., et al., 258 F. 2d 297 (C.A. 2, 1958) and cases therein cited. Also see Gindville v. American-Hawaiian Steamship Co., 224 F. 2d 746 (C.A. 3, 1955).

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APPELLEES' APPENDIX.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY.

(13)* PLAINTIFF'S EVIDENCE.

JAMES P. CRAFT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Borowsky:

Q. Mr. Craft, what is your occupation?

A. Longshoreman.

• • •

(14) Q. Were you working in any particular hatch aboard that vessel?

A. In No. 1 hatch.

• • •

(19) Q. What if anything was down in that lower tween-deck?

A. Well, bales of burlap.

Q. Will you describe for us, please, where these bales of burlap were with respect to the sides of the deck which you were referring to and also with respect to the front and back ends of that particular deck?

A. Well, the burlap was stowed all over the hatch just about level.

Q. And how were they stowed?

A. They were stowed in tiers on the flat.

Q. When you speak of "flat" what do you mean by that?

A. Well, the bale has an edge to it; there is an end to it; and there is a flat side. So they were stowed level on the flat.

* Figures in parentheses refer to page numbers of typewritten transcript.

Q. All right, suppose you describe for us the size of these bales, how big they were, and what general shape they (20) were.

A. Well, I would say they were about 4 foot long, about 3, 3½ foot wide, and about 2 foot thick.

Q. And when they were laid on there flat, then, they were laid on the 2-foot thick side; is that correct?

A. That is right. That is right.

Q. Now, how were they stowed with respect to looseness or tightness?

A. Well, they were stowed right across from one side of the hatch to the other in tiers, stowed tight.

• • •

(21) Q. Did you in fact that day, Mr. Craft, use a certain device to raise these bales out of the hold?

A. We used burlap hooks.

(22) Q. Sir, I show you an object which I will have marked P-1 for identification and ask you if you can identify this object.

A. That is the same kind of hooks we used.

• • •

(28) Q. What do they do with the hooks?

A. They hook them underneath the bands of each bale.

Q. And how many bales?

A. Two bands.

Q. Yes, but how many bales do they put the hooks under?

A. Three bales.

Q. They put two hooks under two bands on each of three bales?

A. That is right.

• • •

(29) Q. After they have these hooks put underneath these bands what if anything do you do?

A. Then I bring the cargo hook over to wherever the draft that I am going to take out is, and I place the ring in the cargo hook.

• • •

Q. Then what do you do?

A. And then if the draft is underneath the coaming or anything I will walk out to the opening, hatch opening, and give the hatch tender a signal to bring it out.

• • •

Q. All right, when you are ready to move out the set of three bales that are in this burlap hook arrangement, and you have taken the ring of that burlap hook and put it in the cargo hook, and you are not within the sight of that (30) hatch tender—he cannot see you if he looks straight down—what if anything do you do?

A. I walks out to the hatch opening where I can see him and he can see me, then I give him signals according to what I want him to do.

• • •

Q. I see; then what if anything does he do, the hatch tender?

A. Then he gives the winchman the signal.

• • •

A. Well, then the hatch tender brings it out into the square of the hatch.

Q. When you say "brings it out into the square of the hatch" what do you mean by that?

(31) A. See, sometimes your draft is underneath in the wing; then I will give him signals to draw it out in the square of the hatch where he can see it, then he will bring it right under the hammer at the boom, straight.

• • •

(32) Q. When the draft is under the end of the boom so that when the cable drops from the end of that boom in a straight line would you say that the draft is underneath the hammer?

A. Underneath the hammer.

Q. All right, then what happens after you have the draft down in the square of the hatch underneath the hammer of the boom? What happens?

A. Well, now, the hatch tender will give the winchmen signals, what they call "just pick it up, tidy it up," to see whether it is correct and straight to go out or not, and if it ain't, he will steady it or catch it till they get it steady so when they pick it up it will go straight; it won't be zigzagging either way.

(33) Q. When the draft is started up on its way out of the hold what if anything do you do?

A. I generally stand at the end of the hatch opening and watch the draft till it gets a certain height, then I goes back underneath with the rest of them in the clear.

Q. What if anything are the other men doing as the draft is going out of the hold?

A. They are in there standing out of the way until it get out, get clear of the coaming, then they go to work and prepare to hook on the next draft.

Q. When you say they stand out of the way, where exactly do they stand?

A. Back under the coaming.

Q. And when you say "under the coaming" do you mean under the deck above them?

A. That is right.

Q. In other words, there is nobody exposed to the opening of the deck; is that right?

A. No, I am the last man to leave the opening, to see the hatch tender.

* * *

(38) Q. Now, was there any particular order in which you went about removing the bales? Did you start at any particular place and did you go from that place to some other place, and so on?

(39) A. Yes, we started near the center of the hatch opening in the after end of No. 1, taking out three bales in rota-

tion at a time until you moved the whole height off all over the hatch coaming.

• • •

Q. When you talk about height are you talking about a tier or a row of bales?

A. One layer.

Q. One layer?

A. One layer all over the hatch.

• • •

(40) So you start at the middle and work towards both sides and toward the back until you have one whole layer off?

A. That is right.

Q. And then you start on the next layer beneath it?

A. Yes, the same way.

Q. Were there any other bales in the hold which for some reason or other were not touched in this operation?

A. Yes, in the forward end you had New York bales in there.

Q. How do you know they were New York bales?

A. They had the New York name on them and stamped the same as Philadelphia.

Q. Where were they with reference to the bales that were stamped Philadelphia?

A. Well, they were in the forward end, and they came back I will say about near half of the hatch, from wing to wing (41) forward.

Q. Were any of those bales taken out during the time that you were working that afternoon to your recollection?

A. No, not any of them.

• • •

(46) Q. And how did you go about your work after he was hurt?

A. The same identical way.

Q. Had any of the bands on any of the bales broken before (47) on that afternoon, before the one that resulted in this bale dropping down?

A. Not many a one.

Q. Did you continue to use the burlap hooks?

A. We did.

Q. And was the manner of taking out the bales different or the same as you had been doing the rest of the afternoon before the accident?

A. The same identical way we were taking them out all the time.

* * *

Q. Had you ever handled burlap bags before, burlap bales (48) before, that resembled these that you were handling on the "City of Calcutta" July 1, 1955?

A. That is the only way that we ever have handled them since I remember.

Q. No, I say, had you ever handled them before that day?

A. Oh, no, not until that day we started there, but we have handled them on other ships.

Q. That is what I mean; you had handled them on other ships, had you not?

A. Oh, many times.

Q. How often had you had occasion to work either in the hold or in any other capacity while they were unloading bales of burlap of the same general size as these?

A. Well, I would say at least twice a month, maybe sometimes three times a month; but I am sure it is about twice a month we would get a ship.

Q. For what period of time before July 1, 1955, had you been handling bales of this kind two or three times a month?

A. In what pier?

Q. In what pier and over what period of time?

A. Oh, I have been handling them say about ten or twelve years or more.

Q. At what particular pier?

A. Pier 98.

(49) Q. On what particular ships?

A. Well, there is more than the City boats—some, the "Calcutta" and different ones.

Q. What if any method did you use to take out those bales?

A. The same identical hook, burlap hooks.

Q. How many bales were removed at a time on those occasions?

A. Three bales.

Q. How many hooks were placed in the bands of the bales on those occasions?

A. Two hooks in each band—in each bale—one in each band.

Q. Did you employ any other method? Did you use any other method?

A. Oh; no; that is the only way we ever sent them out.

Q. Did anybody ever tell you to use any other method?

A. No.

Q. I believe you testified that as the bales were raised out of the hold the men would be under a wing.

A. They would.

Q. Now, why is that done?

A. Because that is the union rules, for safety. When you hook on a draft, regardless of what kind of cargo it is, the men never stand out in the hatch opening; they always goes under the coaming. That is just a safety rule we always (50) use.

Q. Why do they have to get under the coaming? What do they have to be afraid of?

A. Well, if anything happened, the boom break, a fall break, tray come down—I have seen many things happen; you are not safe in the square of the hatch at no time when a draft is being lifted in or out.

• • •

(54) Mr. Borowsky: Your Honor, before I turn the witness over for cross-examination I would like him to identify one other exhibit, if I may.

Mr. Craft, I show you an object——

Mr: Byrne: May I see those first?

Mr. Borowsky: I show you an object which will be identified as Exhibit P-7 and ask you to examine it, please, and tell us if you can recognize it and tell us what it is.

The Witness: This is one of the bands that was on the bale.

By Mr. Borowsky:

Q. Are you talking about the particular bale that we are concerned with or that was on one of the bales that you were handling on the day of July 1?

A. It is one of the same band. I don't know whether it was on that bale though.

Q. You don't know as a matter of fact whether it came out of any of the bales that were on the ship July 1?

A. No, I don't.

(55) Q. But it is the same kind of band that was on the bales that you were discharging that day; is that correct?

A. Correct.

• • •

(55) Cross-Examination.

By Mr. Byrne:

• • •

(60) Q. In other words, if you pull them out this way, out of stow, the same hooks in the same bales or in the same band are used to raise them right up; is that correct?

A. The same hooks is used to raise them up.

Q. And you don't change the position of the hook on the band, do you?

A. If it is not straight or direct that is what you touch it for—to change it and get it right before you start it out.

Q. You say "touch it for"—my question is with regard to the hooks. Do you move the hooks? Do you take them out and put them in any different place?

A. Not if they are correct, you don't. But if they are not correct to carry the draft out, then you straighten them before the draft leaves the deck.

• • •

(66) Q. May I have the photographs? Now, Mr. Craft, I take it from the fact that you have said that on this day the hooks were placed in the two center bands, on the flat side near the center of the flat, that you considered that the proper way to do it.

A. Well, that is the proper way that I always hook them on.

Q. I see. Now, someone from the Atlantic & Gulf Stevedoring Company gave you instructions as to the proper way to hook them, I take it?

A. No, they never gave me any instructions. I been hooking them long enough to know how.

Q. No one from Atlantic & Gulf ever gave you any instructions as to the manner in which these hooks should be placed?

A. No, I was aware of it years ago. No one gave me any instruction on how to hook them on; I know how to hook them on.

Q. Well, how did you know how to hook them on, Mr. Craft?

A. From self-experience. Years ago I learnt.

(67) Q. I see; and based on your experience, your testimony is that this is the best way—to put it on the flat surface near the center?

A. That is the best way to carry them up straight.

Q. But nobody ever told you that?

A. Well, maybe years ago they may have told me something when I first went there, but they don't have to tell me now after I learnt.

Q. Well, I appreciate that, but I am going back as far as your memory goes.

A. No, I caught on to the work by working under others that knowed it, before I went there, and I watched them and caught on to it.

Q. So no one, as far as your knowledge goes, on the part of Atlantic & Gulf Stevedoring Company ever told you what the correct way was to put these hooks under the bands?

A. No, no one ever had to tell me; I already knew.

Q. The straps on the bales—all these bales come with four tightly fastened bands around them, do they not?

A. Yes, all the burlap bales have four bands around them.

• • •

(71) Q. And you said yesterday that those bales are stowed very tightly.

A. Yes, they are stowed tight.

• • •

(73) Q. Now, Mr. Craft, with a weight of between a thousand and fifteen hundred pounds is that the way these bales are supported? In other words, one side of the hook touches one side of the band and the other side of the hook touches the other side of the band?

A. When you pick up the weight it goes in there like that.

• • •

The Witness: When you pick up the weight it presses the hook into the band, correct?

• • •

(77) Q. Now, Mr. Craft, how long have you been doing that work that way for Atlantic & Gulf Stevedoring Company?

A. Ever since I have been working.

Q. Well, how long is that for this company?

A. Oh, I will say about fifteen or twenty years in and out.

• • •

Q. Now, what other cargoes come in bales? A great many other cargoes, do they not?

A. Oh, they have wool in bales, they have rags in bales, they have several different cargoes in bales; they have paper in bales.

• • •

(78) Q. Are they all discharged with this same hook?

A. Oh, no; we have different hooks for different cargo.

• • •

Q. And when you say you have other hooks that you use for these steel bands beside these.

A. Yes, these hooks is burlap hooks; we only use them for burlap. I have never used them for anything but burlap.

• • •

(80) Q. • • • Now, Mr. Craft, you have testified that you followed the draft that was involved in this accident up with your eye, so to speak, as it went up toward the main deck of the ship.

A. That is correct.

Q. And at what point did the bale start to fall?

A. Well, I didn't see it when it fell—started to fall. How far—I only looked as far as I could see till it got up somewhere toward the top deck and then I went back under the coaming in the clear.

Q. I see. Now, up until that point everything about the movement of this particular draft of bales out of the ship had been normal?

A. It was going on normal as usual.

Q. At the proper speed?

A. Yes, just an average speed as usual.

• • •

(87) Mr. Byrne: I ask the reporter to mark this photograph which has been marked D-4 at a deposition by striking off the number D-4 and giving it another number in this sequence.

(Photograph previously marked D-4 on deposition marked Exhibit D-2.)

The Court: Show it to the witness.

By Mr. Byrne:

Q. Yes, take a look at that, Mr. Craft, and tell me if you have ever seen bales discharged with that sort of sling around them.

A. I don't know what kind of bales are they.

Q. It doesn't matter what kind of bales they are; I just want to know whether you have ever seen bales discharged with that sort of sling around them.

A. That is a wire cable, isn't it?

Q. I believe so.

A. No. I have never discharged none like that.

Q. You never discharged any bales in the Port of Philadelphia in that fashion?

* * *

(91) Q. So that any experience that you tell us you have gotten over the years, you got from the Atlantic & Gulf Company; is that right?

A. With bales of burlap I did.

Q. All right. Now, in your experience discharging these bales of burlap, this was not the first time you had ever seen a band break, was it?

A. Well, I have——

Q. Yes or no; then you may explain.

A. I have seen a band break.

Q. Right. And it usually breaks when you are breaking it out of stow, doesn't it?

A. Yes, the only time I have ever seen one break is when it was tight and we was yanking it out of a clinch.

Q. And as a matter of fact wouldn't you say that you break bands on as many as 5 per cent of the bales?

A. Break what?

Q. That a band breaks on about 5 per cent of these bales?

A. Oh, no, I have never seen but one or two break yanking them out in my whole time of working, because we always get them in a way that you can get them in the clear.

Q. I see, but you never the less make very sure that everybody is back out of the square of the hatch when they (92) are being lifted.

A. Certainly.

* * *

Mr. Byrne: I think that is all.

By Mr. Marshall:

* * *

(93) Q. Would you be able to estimate about how many bales you had removed prior to the time that Mr. Beard was hurt?

A. Well, we were just going on at a steady gait. I couldn't exactly say, but we moved about, I would say, very nearly two tiers, two heights, rather.

Q. And two heights would be about how many bales —just a rough estimate? Would it be fifty, seventy-five or a hundred?

A. Well, I am giving you a rough estimate now. I would say it would be fifty-five or sixty bales. Maybe you got twenty-five on a height across there; I didn't count the bales.

(94) Q. All right, had you had any trouble with any other bands on any of those bales up until the time Mr. Beard was hurt?

A. You had not.

Q. Had you had any trouble with any of the bales after Mr. Beard was taken and you finished the unloading operation that evening?

A. We did not.

Q. This was the only bale that you had this difficulty with; is that correct?

A. That was the only bale that came out of that draft.

Q. Mr. Byrne asked you whether you had ever seen bands break, and I understood you to say the only time you had ever seen a band break was when it was jerked out of tight stowage.

A. That is right.

Q. How many of those have you seen break?

A. Oh, maybe one or two in the whole time I have been working.

Q. And how many years is that, Mr. Craft?

A. Around, I will say, twenty years, or fifteen years.

Q. Now, Mr. Craft, once that draft is gotten under the hammer, as you describe it, and once that lift begins in a straight, steady pull, as I understand you said applied here——

(95) A. That does.

Q. —have you ever seen one of these bands break or one of this bales fall on a straight pull of that draft upward?

A. Never have I—never.

Q. Except on this occasion?

A. Except that one did on that occasion.

• • •

(98) RE-DIRECT EXAMINATION.

By Mr. Borowsky:

Q. Mr. Craft, isn't it a common tool for a longshoreman to carry a hand hook which has a little handle and has a hook—do you know what I mean?

A. Yes, sir.

(99) Q. That is a common tool longshoremen carry when they do certain types of work?

A. That is right.

Q. Can you use such a hook when you have a cargo like burlap? Can you use those hand hooks on burlap?

A. Oh, no, you ain't allowed to use any kind of hook on burlap.

Q. Why is that, sir?

A. You will damage the cloth in there.

• • •

Q. What was the condition of the tiers of bales in the hold of the ship, in the orlop deck, with respect to the distance from the deck above?

A. What was the distance?

Q. How much head space or how much space was there from the tier that the men were working on removing the bales that were in this draft that was being removed at the time of the accident? How much space was above them?

A. Oh, you had space to get under the coaming.

Q. How much space was that? Can you tell us?

(100) A. I would say about six or seven feet, something like that, clearance on top of the bale underneath the deck.

• • •

Q. Now, when you started in to work for the first time in (101) that orlop deck, removing the bales or burlap, were you able to walk underneath the deck above?

A. Oh, yes; you could get under there.

Q. So that when you started there was enough head space above the top tier of bales for you to walk under the deck above; is that correct?

A. That is correct.

• • •

(108) PERRY LEE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Borowsky:

Q. Mr. Lee, what was your occupation on July 1, 1955?

A. I was a hatch boss.

Q. Who was your employer?

A. Atlantic & Gulf Stevedores.

The Court: Keep your voice up, Mr. Lee. Talk out loud.

The Witness: Atlantic & Gulf.

By Mr. Borowsky:

Q. How many years had you been a longshoreman prior to, before, July 1, 1955?

A. Four years.

Q. A longshoreman or hatch boss?

A. Hatch boss, four years.

Q. How long had you been a longshoreman all together before July 1?

A. Fifteen years.

Q. Now, the years that you were a hatch boss, were they for Atlantic & Gulf Stevedores, Incorporated, or for other companies?

A. Atlantic & Gulf.

(109) Q. Were you in charge of a gang of men that were working on the "City of Calcutta" on that day?

A. I was.

* * *

(117) Q. Now, will you tell us how the men then went about doing their work, and where the cargo was in the deck where you had to work the cargo.

A. We went down—the men went down—the men went down (118) in the hold to discharge the cargo. They found two ports of burlap.

Mr. Byrne: Two what?

The Witness: Two ports of burlap—that would be the New York Port and the Philadelphia Port.

The New York Port was in the forward end, stowed from the forward and back to the half end—and I would say about the center of the hatch. I wouldn't know how many feet it was from the forward end coming back, say to the center of the hatch. And the Philadelphia cargo was in the after end from what New York would be, in the after end.

Q. Was there any separation between the New York bales and the Philadelphia bales?

A. Separation by writing. New York had "New York" on it.

Q. And was this writing on the bale itself?

A. Was on the bale itself.

Q. But aside from the writing that appeared on the burlap bale itself were there any physical separation between the Philadelphia bales and the New York bales?

A. Only the Philadelphia and New York name, writing on it; that is all.

Q. With respect to the height of these particular bales that were consigned to Philadelphia and consigned to New York (119) was there any difference in height or were they about on the same level?

A. I wouldn't say how they was or whether they was on the same level; I was too far away. I was up on the deck.

Q. I see. At that time when you started in you were on the top deck. Now, did you notice from time to time the manner in which the men who were working in the hold were taking out this cargo?

A. I did.

Q. And what if anything did you see them do, and what did they use to do it with?

A. They used the burlap hooks.

Q. And will you tell us how many bales they removed at one time with these burlap hooks?

A. Three.

• • •

(121) Q. Now, at any time that day were you present when an accident happened which resulted in the injury to one of the men in the hold?

A. I did.

• • •

(122) Q. What if anything did you see?

A. I saw the three bales was coming up from the hold, and all of a sudden one bale popped loose, and I yelled down in the hold to tell the mens to look out.

Q. When that bale popped loose, where was the draft of bales with relation to the topside deck?

A. That was about, I would say, about 5 feet from the top deck.

Q. And when you say it popped loose, what happened? What did you actually see?

A. The two metal bands, the two middle bands, popped loose and it went back down in the lower hold and hit one of those bales was from New York.

Q. What hit one of those bales?

A. The bale what fell from the three bales fell back down in the hold and hit one of those bales in the New York bales, and give them a rolling count and the bale went back in the after end, rolled back in the after end, and when I hear it, I hear the boys down in the hold say, holler out, "There is a man hurt. Send us a tray." A tray would be like made of wood, like a wooden platform like, and I hollered over the rail of the ship to the boys down on the pier to send up the tray, there is a man hurt, and they rushed the tray, and by the time the tray was hooked on, on the pier, I went down the (123) ladder, down down into the hold, and when I got down there Mr. Beard was laying

down with his face full of blood and his feet were curled up under him.

Q. Where was he lying? With respect to what part of the hatch?

A. He was laying to the after end bulkhead.

Q. How far away was he from the bulkhead?

A. He was right up at the bulkhead.

• • •

(124) Q. Had you ever discharged bales of burlap before this day of July 1, 1955?

A. I did.

Q. For whom, sir?

A. Atlantic & Gulf.

Q. In what capacity were you working on those occasions?

A. The same as we were working that particular day.

Q. Well, what was your job?

A. Hatch boss.

Q. Will you please tell us how you went about removing the bales of burlap on these other occasions?

A. The same as we usually work all the time.

Q. What did you use to take bales out?

A. We used those hooks there.

Q. When you say "those hooks there", you are referring to the set of hooks on this rope which has been marked P-1 for identification; is that correct?

(125) A. That is right.

Q. And do you recall any of the particular boats which you removed this cargo from?

A. Yes, I can recall quite a few.

Q. Could you name some of them for us, please?

A. "City of Casa Blanca," "City of Karachi."

Q. Were they vessels to your knowledge that were operated by the same people who were operating the "City of Calcutta"?

A. Yes, sir.

Q. Did you handle this type of cargo at any time after the accident on these vessels of the City Company?

A. I did.

Q. And how did you go about removing the bales of burlap on these occasions?

A. We used burlap hooks just like these there.

Q. Have you ever used any other method to remove bales of burlap in the Port of Philadelphia in your experience?

A. No, sir.

Q. Did anybody ever instruct you as to another method to use?

A. No, sir.

Q. Did anybody at any time warn you about using the burlap hooks and the method you have described to us that was being done on July 1, 1955?

(126) A. No; no, sir.

• • •

(129) PERRY LEE, recalled.

Cross-Examination.

By Mr. Byrne:

• • •

(147) Q. How many times in the course of a month would you say you have seen these straps break during this unloading operation?

• • •

The Witness: I don't know. Not many times I see it bust. Just like I told you, it was a few times but I couldn't tell you how many times.

By Mr. Byrne:

Q. Well now, look, Mr. Lee, after you discharged a whole holdful of these bales, isn't it true that you might find as many as twenty-five to fifty broken bands in the bottom of the hold?

A. No, sir; sometimes we load three ships and don't never see one boat.

• • •

(148) Q. Not that you remember. Mr. Lee, I am going to read this whole statement to you and ask you if there is anything else in it that is wrong.

"I, Perry Lee of 744 S. 15th Street, 2nd floor, rear apt., do make the following statement:

"My port No. is 08973."

• • •

(151) Q. "At the time of the accident Riley was bringing up a draft of 3 bales in the usual manner. There was no jerking of the winches on the draft at all. That draft was coming up just as steady and even as any draft could. I know because I was looking right at it. Then I saw one of the straps on a bale break and that end dropped. Immediately the other strap broke, because it couldn't hold the weight of the bale." Is that right so far?

A. Yes, sir.

Q. "Then that bale dropped down from a height of about 20 feet and its corner struck a bale that was setting in the square of the hatch. This caused the bale to roll aft very fast. I couldn't see the men and I assumed that they ran, because I hollered 'Look out!'" Is that right?

A. Yes, sir.

Q. "Beard never had a chance to get out of the way in time. Nothing happened to the ropes or hooks that had hold this bale. They just dangled from the cargo hook." That is right, isn't it?

A. Yes, sir.

• • •

(158) By Mr. Marshall:

• • •

(160) Q. On the particular lift immediately before the band broke can you tell the jury whether the draft was coming up straight?

A. It was coming up straight.

Q. You say it was?

A. It was coming up straight.

Q. All right. Can you tell us whether or not that particular draft bumped into anything such as a part of the coaming or any of the ship's superstructure?

A. It didn't.

Q. Had it done so would you have been in position to see it?

A. Correct.

• • •

(163) All right; now, with respect to—I don't care how many bands you have seen broken, whether two, three, six, eight or ten, can you tell us whether you have ever seen any bands break when the draft is being lifted in a straight, vertical lift without any jerking or any hooking or any bumping?

A. Never have.

Q. The bands that you have seen broken, can you tell us (164) whether they were confined to instances where the bales were being pulled out of tight stowage?

A. They had been busted by pulling out tight stowage.

• • •

Q. Now, you told us that there were ship's officers who would come back and forth, and I think you told us some of them looked down into the hatch. At the time that they looked down into the hatch was this loading procedure under way? In other words, were you unloading these bales while they were looking in and out?

A. Yes, sir.

Q. Did you actually see any of the ship's officers look down and observe this operation?

A. Yes, sir.

Q. And were you present when that took place?

A. Yes, sir.

Q. Could you tell us whether or not any of those ship's officers said anything to you about not doing it this way or doing it some other way?

(165) A. Never.

Q. Have you ever had anyone suggest to you a better or a different method from the one that you were using on that day?

A. No, sir.

• • •

(167) Q. Then I will just ask you this, Mr. Lee: In all of your experience over the years have you ever seen any other method of unloading this type of cargo other than by the method that has been shown and described to the jury in this courtroom?

A. No, sir; I haven't.

• • •

(169) RE-DIRECT EXAMINATION.

By Mr. Borowsky:

Q. Mr. Lee, in the years that you have been working for Atlantic & Gulf removing these bales of gunnies and using these (176) burlap hooks, have they all been the same shape hook?

A. All—always.

Q. And are they all—have they all been the same shape as the one that is in court here?

A. Yes.

Q. And do I understand you to say that you have been taking out bales of gunnies from the "City of Calcutta" before July 1, 1955?

A. I did.

Q. And upon those occasions, the officers of the ship, were they present or not present when the bales were being removed?

A. They were present.

• • •

(173) Q. Now, are you familiar with this little blue book that has been marked P-9? (Handing witness.)

A. Yes, I have seen this before.

• • •

Q. Did you ever get one of these, Mr. Lee?

A. Yes, I has.

• • •

(193) DAVID GREGORY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Borowsky:

Q. Mr. Gregory, were you working as a member of Perry Lee's gang the day that Mr. Beard was hurt?

A. Yes.

Q. Will you tell us, please, the part of the work you did that day.

A. I was gangway man, hatch tender.

• • •

(201) Q. Did you see anything happen with respect to the bands on that bale that went down?

A. Well, I saw the bands, the band break, but you know I couldn't see how it break; all I could see is the break and go on back, because it went down so fast you couldn't tell how it break. All I know, it dropped.

Q. Did you watch it as it went down?

A. Sure, I see it as it went down.

Q. What did you see happen as it fell down?

A. Hit the bales in the hatch and bounce and roll under the coaming, and that is all the farther I could see.

Q. Do you know which bales the one that dropped landed on?

A. What it landed on?

(202) Q. You say it hit some bales?

A. It hit the bale in the hatch—the New York bale they call it. I think that is what it was; you know I am not down there; I got to take what they say.

The Court: Don't drop your voice. Keep your voice up, Mr. Gregory.

The Witness: O. K.

By Mr. Borowsky:

Q. When it hit those bales what did you notice happen to that bale?

A. When it hit the bale it rolled under the coaming of the hatch.

Q. In what direction?

A. In the inshore side back aft, the after part there.

• • •

(205) LUTHER MONTGOMERY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

• • •

By Mr. Borowsky:

Q. Mr. Montgomery, were you also a member of Perry Lee's gang on the day Mr. Beard got hurt?

A. Yes, I was.

Q. What was your particular job that day?

A. Hold man.

Q. Did you work with anyone down in the hold or did you work alone?

A. I worked with Leighton Beard.

• • •

Q. Will you please tell us when you went down there to start to work what was the condition of the hatch with respect to (206) the height of the row of bales. How high were the bales with respect to the deck above you?

A. Well, in some parts of the deck the bales were practically all the way up to the deck. They leave space on some side where the men can get underneath of the shelter.

Q. Was there enough room to get underneath the deck for shelter from the time you started to work?

A. Yes, it was.

Q. Were you aware that there were bales destined for New York as well as those for Philadelphia?

A. Yes, there were.

Q. What can you tell us about the height of the bales that were consigned for New York as opposed to those that were consigned to Philadelphia?

A. Well, in the square of the hatch the bales was for New York, also for Philadelphia. They had to work back from the forward end of the hatch. The bales was to go up to New York. The New York freight was further up.

Q. Were the bales that were consigned to New York at the same height as bales for Philadelphia when you started to work?

A. Yes, they were.

Q. Will you tell us how you went about removing the bales, where you started, and how you just went about the work, if (207) there was any order about it.

A. We started—the deckmen set the boom right over Philadelphia freight; they lowered the hook down; myself and Leighton hooked on the bales right underneath the hook when it came down, in rotation across the hatch.

Q. What do you mean "in rotation"?

A. That is bales laying one after another straight on the line.

Q. Was there any way you could move a single bale or any two or in any manner other than by use of these hooks?

A. That was the onliest way to move them, by the hooks.

Q. Was there any way you could turn a bale over, for example?

A. No, you could not.

Q. Can you explain why you could not do that?

A. Because you can't put a hook in it. The hook we carry in our belt we cannot put into a bale of burlap because of damage. We are not allowed to put it in. The only thing we can do is to hook the gear the shipping company give us to move the freight with.

• • •

(208) Q. Did you use an apparatus such as this that has been marked P-1 for identification that day?

A. Yes, looked just like that.

• • •

(210) Q. Could you tell us about what time of day that happened?

A. Exactly, I don't know. I know it was around 4 o'clock some time in the afternoon.

Q. Can you tell us how many bales or how many tiers of bales you had removed by that time?

A. We had already taken off the top tier, and we were working back on the second tier.

Q. Had you touched any of the bales consigned for New York?

A. No, we hadn't.

Q. So would you say that the bales in the forward end of the hatch were one or two tiers higher than those that were in the after end?

A. They were, because the freight in the forward end wasn't stowed; they just dropped the bale in the square of the hatch for New York freight.

• • •

(212) Q. What if anything can you tell us about the movement of that draft from the time that there was first a strain on the burlap bale hooks until the time that it passed beyond your sight?

A. I saw nothing different than the rest of them. I didn't see nothing different in that one than I did the others.

Q. Before you lost sight of it what was the manner in which that draft was being raised?

A. Well, just how fast, I don't know. The way it was going was like the other drafts were.

Q. Where was it with respect to the sides of the hatch opening?

A. It leave from the square of the hatch.

Q. Was it about in the middle of the hatch?

A. It was in the middle.

Q. All right, go on and tell us, please, what happened after that.

A. Well, after this draft had gone up me and Leighton had hooked on our draft and I had laid the hook aside. We walked back to the bulkhead of the ship.

Q. Which bulkhead was that?

A. The after bulkhead. And we heard someone yell up on deck, "Look out fellows, something coming down." So when I went to turn around and look—I had on a pair of khaki (213) pants—I and Leighton were standing face to face—it ripped my pants from here all the way down here—my new khaki—nobody paid for them either. It take Mr. Leighton straight forward to the bulkhead and jammed him against the bulkhead, so I hollered for George Hudson, William Jinnifer, and also Mr. Craft—you come help me take this bale off Mr. Beard. They come and we roll the bale off Mr. Beard and turn him around, and his face was just a mass of blood where he was jammed betwixt the beam on that bulkhead, and his leg was twisted around underneath him. They come down and rolled this bale aside off of him. Mr. Perry Lee come down, and he yelled for the tray, and we lowered the tray down into the hold. We run out and get this tray, bring the tray back to Mr. Beard, lie him on the tray, bring him back underneath the hook, and Willie Jinnifer got on the tray with Mr. Beard and ride with him to the dock. When we got him on the dock—I went up the ladder on the deck of the ship; we

didn't go back to work any more. So he wanted me to go to the hospital with him, so I didn't go back to work that afternoon.

• • •

(217) CROSS-EXAMINATION.

• • •

(223) By Mr. Marshall:

Q. Was this the only bale that fell on this day, the one that struck Mr. Beard?

A. That was the only one fell while I was there.

• • •

Q. Do you recall whether any other bands had broken except the two on this one bale?

A. That was the first that day.

• • •

(224) Q. Could you and Mr. Beard or any other two men that you have ever seen on the waterfront haul any of these bales out and haul them over on a net by hand?

A. You can't get it on a net by hand.

Q. Pardon me.

A. You can't put it in a net by hand; you got nothing to move it with.

Q. As a matter of fact, would you agree that those bales average between a thousand and 1200 pounds?

A. Well, I don't know the correct weight, but I know they is awful heavy.

(225) Q. And as they are stowed in there, even if they were loose would two men be able to pull them out?

A. No, you couldn't move it.

• • •

(227) LEIGHTON BEARD, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Borowsky:

• • •

(229) Q. Now, at what time of the day, if you can recall, did your accident happen?

• • •

(230) A. Well, as far as I could remember, I guess it was around 4 or 4:30; I can't say definitely what time it was.

Q. And at that time can you tell us how much, if any, bales had been taken out in a tier or more?

A. Well, we had taken out a tier and started on the other tier, I think. I think it was practically two tiers was taken out.

Q. Are you certain there was at least one tier removed?

A. Yes, I am sure there was one tier removed.

Q. Now, was there any cargo in the hold that was not touched during the time that you were working down there?

A. Yes, there was cargo in the square of the hatch which was New York cargo, and we didn't touch that.

• • •

(232) Q. Mr. Beard, I do want to ask you one question: With respect to your location at the time that you saw the bale—now, there was a deck above you, was there not?

A. Oh, yes.

(233) Q. How much of a deck was there above you? How far did it extend forward of you? In other words, how much of the deck were you behind when this bale struck you?

A. I would say about 25—about 20 or 25 feet or more.

• • •

(259) RE-DIRECT EXAMINATION.

By Mr. Borowsky:

Q. When you first handled bales of burlap, in order to get them out of the ship's hold what apparatus did you use? What kind of equipment did you use to move them out?

A. Used burlap hooks.

Q. Now, did anybody tell you how to use these burlap hooks? How did you find out what you were to do with them?

A. Well, when you go in a ship's hold if you don't know (260) exactly what to do with them you watch the other man that do know what to do with them; then you operate the same way that he operates.

Q. And had you had that experience before you went aboard the "City of Calcutta" on July 1, 1955?

A. That is right.

Mr. Borowsky: That is all.

• • •

(281) WILLIAM JINNIFER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Borowsky:

Q. Mr. Jinnifer, you are a longshoreman, are you not, by occupation?

A. That is right.

Q. And you were a member of the gang of Perry Lee, which gang was working on the SS "City of Calcutta" on July 1, 1955, were you not?

A. That is right.

• • •

(283) Q. Did you have anything to do with the bales that were in the draft that was involved in this accident?

A. Yes, I did. I hook on, so I hooked them on.

Q. Will you tell us where those bales were, and what you did, and how you went about hooking them on.

A. There were three bales in a row, we hook on, or two bales in the second band, take the hooks and put in the second band.

Q. Do you recognize this object that is marked P-1 for identification, the one with ropes and hooks?

A. That is right. That's it.

Q. Did you use a similar set of hooks on the day of this accident?

A. Use them kind of hooks right there.

Q. And where did you put those hooks into the bales that (284) went up on that draft?

A. The second band from the end, each side.

Q. And how did you put the hooks in there?

A. We pulled them in.

Q. All right; now, will you tell us, please, what you recall of the accident from the time that the bales were ready to go out until the time that the accident occurred.

A. Yes, we hooked the bales on, and then we stepped back so the hook-on man come and take the bales out.

Q. Did he do that in fact?

A. Yes.

Q. Did the hook-on man come over?

A. Yes, he hooked the bales on then he told us to step back. He always tell us, so we walk to the after end of the ship.

Q. And then what happened, if anything?

A. After while I hear somebody holler "Look out!"

Q. Did you see the draft of bales move after the hook-on man had taken the——

A. They carry them out and level them down in the middle or the center of the hatch and then went on up with them, and after while I hear somebody holler "Look out!" and the bale hit a New York bale and rolled—started to roll —and Leighton was standing back in the back, and I told

all (285) of them to look out, and he couldn't get away and the bale jammed him.

Q. You say the bale hit a New York bale?

A. Yes; that is right.

Q. Where were the New York bales?

A. In the forward end.

Q. How far did they extend into the center of the hatch, if you know?

A. I wouldn't know that.

Q. Were the New York bales at that time on the same level as, higher than or lower than, the Philadelphia bales?

A. They were higher than the Philadelphia bales. The Philadelphia bales were lower.

Q. How much higher, do you know?

A. I would say about two—two rows higher.

* * *

(289) Q. What if anything did you notice about the bands on the particular bale that struck Mr. Beard, if you noticed it at all?

A. No, I didn't notice it, because we moved the bale, see; we didn't know nothing about the hooks—I mean the bands. See, we moved the bale, then we tried to get him out of the hole.

Q. I am talking about that particular bale. Did you notice anything about the bands on that particular bale?

A. Yes, there wasn't but two bands on it.

Q. Where were those two bands, if you know?

A. Down in the hold.

Q. Had any of the bands broken before this accident had occurred to Mr. Beard?

A. No, it hadn't.

Q. Did any of the bands break after the accident while you were there, if you know?

A. No, not a band broke.

Q. The bales that you were removing in this particular draft, can you tell us where they were with respect to the square of the hatch?

(290) A. Right to the coaming at the square of the hatch.

Q. What would you say the height, the space, was from the top of those particular bales to the deck above you at that time?

A. I would say about 12 feet, I guess. Might have been slightly more than that.

Q. When you put the hooks in those bales where were they with respect to each other?

A. Just laying just like this (indicating).

Q. Were they in a row, as you indicate with your hands?

A. Yes, a row, yes.

Q. When you spoke about the location of these bales with respect to the coaming, were you talking about, when you mentioned coaming, the edge of the opening of the deck above you? Is that right?

A. I mean—see, they call it coaming out here, like we walk back. This is the coaming of the ship. We walk back to the back. See, the bales is up here. We have to work from here back.

Q. The bales were underneath the deck; is that correct?

A. Right to the edge; they wasn't under the deck.

Q. That is what I am trying to get at. When you say the edge, you mean the edge of the hatch opening; is that correct?

(291) A. That is right.

Q. And the edge of the hatch opening is bounded by what you fellows call the coaming; is that correct?

A. Yes; that is correct.

• • •

(292) CROSS-EXAMINATION.

By Mr. Byrne:

• • •

(303) Q. Mr. Jennifer, I am going to hand you Plaintiff's Exhibit No. 5. That shows two bales, doesn't it?

A. Yes.

Q. Now, isn't it true that one of those bales is hooked so that the open ends of the hooks face each other?

A. That is right.

Q. And the other one is hooked so that the open ends of the hooks do not face each other?

A. That is right.

Q. So that on your testimony, for carrying—for lifting a bale out of the hatch one of these bales is hooked properly and the other one improperly; is that right?

A. No.

Q. You mean they are both correct?

A. Yes, because they are hooked in the second band, see.

(304) Q. No; I am talking about the position of the hooks.

A. I am still talking about the position of the hooks too; I am talking about these bands too.

Q. Well, what are you saying?

A. See this band here. See this hook in this second band. Now, if it was hooked like on this end it would not be proper, but in the second band they are proper all the time.

Q. You are changing your testimony now and saying that even if the open ends of the hooks face in the same direction, so that they both point the same way, that that is proper if they are hooked in the two center bands?

A. That is right. They will go out that way in the two center bands.

Q. You say that is proper?

A. That is proper. The other way too is proper. Both ways are proper.

Q. Both ways are proper?

A. Yes, that is right.

* * *

(308) Q. Now, actually you had to drag these out of stow, did you not?

A. We didn't have to drag them out of stow; they was right at the coaming of that ship.

* * *

(312) Q. Now, in answering Mr. Borowsky before lunch, Mr. Jinnifer, he asked you some questions about whether you saw this bale in the hold after it fell; do you remember that?

A. Sure, I remember.

Q. And I think he also asked you whether you saw the two bands that broke off, and you said you saw them down in the hold.

A. That is right.

Q. That is right. Now, where were they in the hold?

A. Laying right in front of the New York bales, most of the New York bales.

Q. Who took them?

A. I don't know who took them.

Q. Did Mr. Perry Lee go down in the hatch when the accident (313) happened?

A. Yes, he went down in the hatch. He helped put the man——

Q. Did anyone else from Atlantic & Gulf, any other of the longshoremen, whether they were just workmen or foreman, did any of them go down in the hatch?

A. Go down in the hatch?

Q. Yes.

A. I wouldn't know that.

Q. You were there. Didn't you see them?

A. I seen my boss go in the hatch.

Q. That is Perry Lee.

A. That is Perry Lee.

Q. Did you see anyone else from Atlantic & Gulf go in the hatch?

A. No, I didn't see none but Perry. I seen the mates come by and look down there—two mates come by and looked down in there.

Q. They were up on the deck?

A. The mate?

Q. Yes.

A. Yes, he was looking down in the hold.

Q. But I am talking about going down in the hold where Mr. Beard was and where these broken bands were.

A. I don't know anything about that; I don't remember that.

(314) Q. Nobody from the ship came down there, did they?

A. Anybody on the ship came down there?

Q. Yes.

A. No, because the mates didn't come down; they stood and looked in the hold.

Q. Stood up on the deck?

A. And looked down in the hold.

Q. And there were five men from Atlantic & Gulf Stevedoring Company down there?

A. Five men? Sure, there was five men.

Q. Five men—Mr. Perry Lee, you, and Hudson, and the two fellows that were working the other side—and you don't know what happened to this broken band.

A. What happened to them broken bands; that is right—two broken bands.

Q. What did you do, leave them there?

A. I don't know. I wouldn't know that.

Q. Well, you say they were lying right in front of the New York cargo?

A. That is right.

Q. They would be in your way there, wouldn't they?

A. How could they be in my way if they are laying on the skin.

Q. On the what?

(315) A. Here is a New York bale here. They were working back here. They wouldn't be in our way.

Q. I know, but you had to drag these bales to the middle.

A. Drag the bales to the middle, sure, but that wouldn't make no difference about them bands.

Q. They were lying right there but you don't know what happened to them?

A. No, I don't know what happened to them.

• • •

(316) Q. Did you notice anything wrong with the band when you hooked into it?

A. No, just as flat as could be; wasn't nothing wrong ——

Q. —flat?

A. Flat—just like it is supposed to be on the what do you call it?

Q. Just like it is supposed to be——

A. Yes.

Q. —tight?

A. Yes, tight.

• • •

(317) If you place those hooks so they twist that metal that will weaken it, won't it?

A. It can't twist it when you set them in there and they come up like that. They always set flat; you can't twist them.

Q. They always sit flat?

A. Yes, you can't twist them.

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(318) By Mr. Marshall:

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(319) Q. Now, Mr. Jinnifer, think back and tell us whether any other bands had broken.

A. No, I never——

(320) Q. Besides the one involved in the bale that hit Mr. Beard.

A. No, that is the onliest time we had any broken bands, that bale.

Q. All right; after Mr. Beard was taken out were you there when you continued to work?

A. That is right.

Q. Can you tell us whether any bands broke after the one that dropped the bale that hit Mr. Beard?

A. No, there wasn't none broke afterward.

Q. All right; how long have you been a stevedore?

A. Ever since '42.

Q. And during the course of those years have you worked for any companies other than Atlantic & Gulf?

A. I have.

Q. Name some of the companies?

A. Galco, Murphy-Cook, Nacirema—I can't name them all; there are so many.

Q. All right, do you know whether any of these other companies unload bales of burlap, or does just Atlantic & Gulf unload them?

A. I know Atlantic & Gulf, but I ain't sure of the rest of the companies.

Q. You aren't sure of the other companies?

A. No, I ain't sure.

(321) Q. And since 1942 on different occasions have you seen bales of burlap being unloaded from different ships?

A. I sure have.

Q. And have you helped unload on different ships?

A. Yes, I have. Yes, I have.

Q. I mean, since 1942?

A. Oh, yes, I have.

Q. Now, Mr. Jinnifer, can you tell us whether or not you have ever seen any other method used except the method using these hooks in the two bands?

A. That is right; that is the onliest method I ever seen.

Q. Have you ever seen any other method?

A. No, I haven't seen any other method.

Q. Would you agree that these bales weigh between a thousand and 1200 pounds?

A. I guess they do. I don't know how much they weigh; I couldn't tell you.

Q. About that much. Do you from your experience know whether two or even three men could have pulled one of those bales out of stow by hand?

A. No; it took four or five of us to get it off Leighton there.

Q. You mean after the bale was loose.

(322) A. Yes.

Q. The one that was on Beard took how many men to move it?

A. Five—me, Perry Lee and the rest of them down the hold, because he was the onliest one that was hurt.

Q. And that bale was about the same size as all the other bales?

A. Yes, same size.

Q. As a matter of fact, Mr. Jinnifer, using these hooks which you have been asked about, is it true that as long as that band is seated in let us call this the bottom of the hook——

A. That is right.

Q. As long as that band is seated in there is there any way that that band can slide off that if it is being lifted straight up?

A. No, no way it can slide off.

Q. Have you ever seen one slide off.

A. I haven't never seen none slide off.

Q. So as a matter of fact as long as the bands are seated in the bottom part of the hook, whether the open end is turned one way or another way would it make any difference actually?

Mr. Byrne: Objected to.

A. It would not make no difference.

* * *

(323) Q. I ask you whether it would make any difference whether the hooks were used with the ends facing each other or in the same direction, providing both bands were seated in the bottom of the hook.

A. That is right; it will carry it as long as it is seated in that——

Q. And it would make no difference?

A. That is right.

• • •

(328) ROBERT ARTHUR, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Borowsky:

Q. What is your present occupation, sir?

A. Safety engineer for the United States Lines, Philadelphia.

Q. Is that a steamship company that operates here in Philadelphia?

A. That is right.

Q. And where do you perform your services?

A. On Pier 80 South, at the foot of Jackson Street.

Q. Will you explain to us, please, the duties of safety engineer as you understand them to be and as you practice them.

A. Well, as a safety engineer around the pier and around the ships you see that everything is safe for the men to work, in safe condition for them to work under.

Mr. Marshall: Would you keep your voice up, please, so we can all hear.

The Witness: And, of course, if there is any fault you find there, you get it straightened out.

By Mr. Borowsky:

(329) Q. How long have you done work as a safety engineer in the Port of Philadelphia?

A. About two years.

Q. Before that time, sir, what was your occupation?

A. I was a master mariner.

Q. Will you tell us what you mean by master mariner, sir?

A. Well, I have served at sea for forty-three years. I have served in all capacities in the deck departments.

Q. Have you been in charge of the vessel as master of the vessel?

A. I have.

Q. Do you hold any licenses from the United States Coast Guard?

A. Sixth issue of master's license, unlimited.

Q. What does that mean, unlimited, sir?

A. It is any tonnage, any ocean. It is unlimited tonnage.

Q. In other words, any vessel?

A. Any vessel.

Q. And any place?

A. That is right.

Q. In addition to having served as a master on merchant vessels, have you served in various capacities in the deck department?

A. More so than as master.

(330) Q. Among those capacities have you served as a chief mate?

A. Many long years.

Q. Sir, have you been in the service?

A. Yes.

Q. In what branch of the service?

A. Well, in the Navy.

Q. And will you tell us, please, whether your duties in the Navy had anything to do with the handling of cargo?

A. During the war, during this past war, I was cargo operations officer on most all the major bases in the South Pacific.

Q. What was your rank in the Navy, sir?

A. Well, they called me back and gave me the rank as lieutenant when they called me back, and then when I finally

finished up I finished up as commander and they retired me as a captain.

Q. Sir, during your experience in the Navy what kind of cargoes were handled by the various vessels under your charge?

A. Well, we handled all types of cargoes; we handled almost anything you could think of in the line of cargo.

Mr. Byrne: I cannot hear you, sir. Will you keep your voice up.

The Witness: We handled all type of cargoes.

(331) By Mr. Borowsky:

Q. Did you, sir, at any time occupy any capacity shorewise in connection with stevedoring operations?

A. Yes, I did, right here in the City of Philadelphia and in Norfolk, Virginia.

Q. Will you explain to us in what capacities you served.

A. As a stevedore superintendent, which——

Q. And in that particular job what if anything did you have to do with the handling of cargo?

A. That was always the handling of cargo; that is your function as a stevedore superintendent, to be around the ships and around the cargo.

Q. And did you have any people working under you as superintendent?

A. On merchant vessels as a stevedoring superintendent you would have all your hatch foremen working under you.

Q. Now, sir, in your experience have you had occasion to be aboard vessels in the capacity of a deck officer while the vessel was carrying a cargo of gunnies in bales banded with steel bands such as are shown, or such as we have here marked P-7?

A. Yes, sir. Yes, sir; we have.

Q. Will you tell us, please, how that cargo was discharged from the vessel?

(332) A. It was discharged with hooks.

Q. Will you describe the hooks to us, please?

A. Well, your hook for this type of band is a flat hook. It is flattened out to slip underneath these bands.

Q. Sir, I show you an article here that has been marked P-1 and ask you to examine the hook on this object.

A. Yes.

Q. How does that hook compare with the hook that you have just mentioned in your testimony?

A. The same types of hook.

Q. How many bales were discharged at a time by the use of these hooks?

A. I have seen mostly three at a time discharged with that type of hook.

Q. And what apparatus or to what apparatus were these hooks connected?

A. With the steel bands.

Q. Well now, there was more than one hook, wasn't there?

A. Oh, yes; there is two hooks to a bale.

Q. And this exhibit that we have here, P-1, shows six hooks in all. From your experience is that the common type of hook that is used?

A. That is the common type of hook that is used to take out three bales with.

(333) Q. Have you in your shoreside activities as a stevedore superintendent seen bales of burlap discharged?

A. Yes, I have.

Q. And what method have you seen used in that connection?

A. Hooks.

Q. And were they also attached to ropes as is indicated in this Exhibit P-1?

A. That is right.

Q. What purpose do the bands of the bales play in this type of operation?

A. Well, these bands have two purposes.

Mr. Byrne: I object. This man is not qualified to testify as to the purpose of these bands or to anything other than the basis of his experience.

The Court: Oh, no, he can testify as to what his experience is, what purpose they have. Objection overruled.

By Mr. Borowsky:

Q. Go on, sir.

A. These bands have two purposes. The bales are compressed very tight, and they help to hold that compression there together, and they are also used for hooking into with your hooks to discharge them.

Q. Have you seen in your experience whether it be as a (334) civilian or in the service handling cargo operations whether it be as a deck officer or in the stevedoring side of the waterfront activities, any other method used to discharge bales of gunnies banded as they are in this case with steel bands?

A. No, sir; I never did.

Q. Now, sir, by whom is the cargo aboard merchant vessels normally handled when it comes into port?

A. By longshoremen. Some people call them longshoremen—stevedore is the man that works the ship; longshoreman is the man who actually handles the cargo in the holds or on the dock.

Q. What if any control does the chief mate have over the discharging operations?

• • •

(336) The Court: Read the question for Mr. Byrne.

(Question read as follows: "What if any control does the chief mate have over the discharging operations?")

The Court: That is right—of any ship of any cargo. You may have your exception; let us proceed.

The Witness: The chief officer is responsible for that cargo in that vessel.

• • •

(338) By Mr. Borowsky:

Q. What are the duties of the chief officer while discharging operations are going on?

A. Well, the chief officer has under him three other officers, or two others—some ships carry three; some ships carry four—but it is the chief officer's duty to the other officers to be around the hatches and see that everything is going along all right, to see that things are safe and that——

Q. How does the chief officer——

Mr. Byrne: Don't interrupt the witness.

The Witness: See that they are not busting up a lot of cargo on them—rough handling or anything like that.

• • •

(346) The Court: I don't know. Do you want to question him as to his qualifications?

Mr. Byrne: Yes, sir.

The Court: You are entitled to do that. You haven't until now. All right. Just a minute.

By Mr. Byrne:

• • •

(347) Q. Oh, have you ever seen a band of that heavy strength break?

A. No, sir; I have never seen a band of that heavy strength break.

Q. Have you ever seen bands of that heavy strength discharged?

(348) A. Yes, sir.

Q. Now, how heavy is that band? Did you have an opportunity to examine it before you came into court today?

A. No, sir; I have never seen that particular band you have laying there. I have seen bands like it.

Q. Well now, how do you know what the quality of that band is just from simply sitting in the witness chair?

A. Well, we lash an awful lot of cargo with bands. Of course, that is something new that developed during the war years, using bands for lashing cargoes, which are very strong, and this type of band here I would say that is good to pick up a ton, ton and a half.

Q. Captain, how can you tell——

A. Just by looking at the band itself.

Q. Just by looking at it?

A. That is right.

Q. Without knowing anything about the quality of the steel or the tensile strength?

A. No, I have no idea of the quality of that steel or anything like that, but I know it is a good solid band.

Q. Just simply from sitting up there?

A. By handling and seeing them handled.

Q. We are talking about these bands that are in court here.

A. Yes.

(349) Q. Not some other bands that you may have seen down on the waterfront.

A. No.

Q. Now, have you seen—examined the bands that are here in the courtroom sufficiently to——

A. No, sir; I haven't examined them. I am just sitting here looking at them, looking at the size of them.

Q. And you have seen bands of that size break while carrying bales of cargo?

A. No, I didn't say bands of that size; I said, I have seen bands break.

Q. But never bands of that size?

A. Not of that thickness.

Q. And bands of that type?

A. No, sir; I have not.

• • •

(351) By Mr. Borowsky:

Q. Captain Arthur, I show you a booklet that has been marked P-9. Will you examine it, please?

A. This is a book put out by the Philadelphia Marine Trade Association.

Q. What is that booklet, sir?

A. It is safety rules for the safety——

• • •

The Witness: Safety rules for the safe handling of cargo.

• • •

(352) Q. Who puts out that particular booklet?

A. P. M. T. A.

Q. What is P. M. T. A., sir?

A. Philadelphia Marine Trade Association.

Q. Philadelphia Marine Trade Association, is it not?

(353) A. Philadelphia Marine Trade Association.

Q. Who are the members of the Philadelphia Marine Trade Association?

A. Well, there is about a half dozen of them.

The Court: I cannot hear you.

The Witness: There is about a half dozen of them; I just don't know all their names.

By Mr. Borowsky:

Q. What category of parties are they?

A. They are shipping men. They are attached to shipping in the Port of Philadelphia.

Q. And do they also include the stevedoring companies—the shipping companies, the stevedoring companies?

A. That is right; the stevedoring companies, the head of a stevedoring company will be a member of it.

Q. And do you know how widely circulated that booklet is? Who gets the booklet?

A. The longshoremen all get these booklets. It is put out for their safety. It is dedicated to your personal safety, for the men to study over.

* * *

(355) Q. * * * To whom, if you know, is that booklet circulated?

A. To the employees themselves. This is put out by the shipping companies, and the head of the shipping companies in the P. M. T. A. It is more or less a safety code to go by.

Q. To whom is it directed? I mean, who are to observe these safety rules?

(356) A. Well, all men connected with the handling of cargo.

Q. And is that for the entire Port of Philadelphia?

A. Yes.

Q. And as far as you know is that book available and is it circulated to the people who actually do the work, whether they be the longshoremen or their superiors?

A. Or their superiors—that is right.

* * *

(360) Q. All right, sir, I refer you again to Page 26 and ask you if there is any reference there as to the method by which bales of gunnies are to be discharged from the holds of (361) vessels?

A. Yes, it is; Item 4.

Q. Will you read it, please?

A. Bales of cotton, wool, cork, gunny bags or other similar articles shall be hoisted by double hooks at all times.

Q. To your knowledge is that practice being followed in the Port of Philadelphia?

A. It is being followed in Philadelphia.

Q. Have you seen any other practice in the Port of Philadelphia or in any other port that you have served in in any capacity for the discharge of bales of gunnies, other than double hooks?

A. No, double hooks only, is the only way I have ever seen it handled.

• • •

CROSS-EXAMINATION.

By Mr. Byrne:

• • •

(362) Q. Have you served as a stevedore discharging these bales of gunnies from India?

A. In Norfolk, Virginia, in 1935.

Q. I see; in 1935?

A. Yes.

Q. How were they discharged?

A. With hooks similar to those hooks here.

Q. Now, was that the last experience that you had in the actual discharge of bales of gunnies from India?

A. No, no.

Q. When was the last time?

A. A few years back with the Grace Line, picking up small lots of them down at Panama, transshipped bales, transshipping from Panama to New York. Transshipped—probably came in from India.

Q. You were what, a deck officer for the Grace Line?

A. Chief officer.

Q. Chief officer?

A. Yes, sir.

Q. And who did the unloading?

A. Longshoremen.

Q. I see. What part did you play in the unloading operation for the Grace Line?

(363) A. Well, to be around the ship and see that everything was going off all right.

• • •

Q. Now, are there three occasions that you have had anything to do with the discharging of these bales of Indian dunnage?

A. Well, on our pier down here, Pier 80, they transship quite a lot of it from England in here, and I watch it coming off, watch the operation; I don't——

Q. Just as an observer?

A. As a safety engineer on the pier I am an observer.

* * *

Q. When you say "in charge of the unloading," that was because you were chief officer of the vessel; is that right?

A. Yes, sir.

(364) Q. What did you mean that for the Grace Line you were in charge of the unloading? Doesn't Grace Line contract that unloading to this Huron Stevedoring Company?

A. They do, but you are still as chief officer responsible for that cargo.

Q. You are responsible—in other words the Grace Line would have to pay the consignee if the cargo was damaged; that is what you mean, isn't it?

A. It would. There would be claims put in if you had damaged cargo.

Q. And that is what you mean by saying you as chief officer would be responsible?

A. That is right.

Q. And that is what you mean earlier in your testimony in answer to Mr. Borowsky's questions when you said that one of the things that a chief mate would do was to see that they, meaning the longshoreman and stevedores, were not busting up a lot of cargo?

A. That's right. That is right—or your gear or anything like that.

Q. Of course, the ship's own gear is a different proposition, isn't it?

A. That is right.

Q. You can control the way in which the ship's winches and (365) booms are used, and if they are abused you may stop the operation; isn't that true?

A. Yes, that is true.

Q. And if you see a stevedore doing work in a way that you may think could be improved upon, it is still not

your place as chief officer to interfere, is it, until there is a likelihood of damage to either the ship, the ship's gear, or the cargo itself; that is correct, isn't it?

A. As long as it is not endangering anyone. But that question of being improved upon—I don't know just how to answer a thing like that. I wouldn't go to a stevedore and tell him how to improve upon the thing.

• • •

(366) Q. Did I understand you to say that if a chief officer and a stevedore could not agree on a method of handling cargo, let us say of discharging cargo, that the recourse which the chief mate would have would be to go shut off the power to the winch?

(367) A. He has that authority.

Q. Pardon?

A. He has that authority.

Q. Yes, but he has no other.

A. Just how do you mean, "he has no other authority"?

Q. Does he have any other authority over the stevedore?

A. Yes, he is over the stevedore aboard the ship.

Q. How can he make the stevedore stop working other than by shutting off the power?

• • •

Repeat the question to the captain.

(Question read: "Does he have any other authority over the stevedore?")

The Witness: In a sense of the word he has. He is over the stevedore. When the stevedore is working that ship he is still over the stevedore.

By Mr. Byrne:

Q. But is there any way he can compel the stevedore to (368) stop an operation—I said "compel"—except by shutting off the power to the winches?

A. He can go to the stevedore and explain to him just what he is doing wrong, or anything like that.

Q. I understand that, but assuming that has been done and the stevedore says, "No, I am going to go ahead." This is the stevedore ship's superintendent, and he says, "No, I am going to go ahead and do it this way." There is no other recourse——

A. Oh, yes, there is one more. You can go to the master of that ship.

Q. And what authority would the master have, except to shut off the power?

A. The master's word is law. If the master says you will stop it, you will stop it; if he says let them work, they work.

Q. You say the master's word is law?

A. That is right; aboard a ship the master's word is law.

Q. That is at sea, isn't it?

A. He is the master of that ship at all times.

Q. Is that at sea or is that in port?

A. Both places—at sea and in port he is master of that ship.

Q. That is theory, isn't it. That is theory, isn't it?

(369) A. It is actual fact.

• • •

(371) Q. Now, getting down to the hooks that were used in this operation, would you agree with the statement that there is a right way and a wrong way to do most everything?

A. Well, I agree there is a right way and a wrong way to do almost anything and everything, but longshore work is something different.

Q. You say longshore work is different?

A. There is a little difference there. You have a different problem than you have out in a factory or something like that.

Q. Well, we are not discussing that. Is it your testimony, Captain, that there is no wrong way to do things in stevedoring?

A. Yes, there would be wrong ways of doing things.

Q. I see; and there are right ways?

A. There are right ways; that is correct.

Q. Let us confine it to stevedoring operations.

A. Yes.

Q. Is there a wrong way and a right way to use these hooks in bales?

A. Those hooks are so constructed you can use them hooks almost anyway.

Q. Almost anyway? In other words, there is no wrong way in your opinion that you can use those hooks?

(372) A. Well, there may possibly be a wrong way to use them hooks, but nevertheless them hooks is so designed to pick up a draft in any position, any position you put the hook.

Q. With safety?

A. Yes, I would say with safety.

Q. You would say with safety?

A. Yes.

Q. You are sure of that?

A. Yes, I am sure.

* * *

(379) By Mr. Byrne:

Q. Would it be proper stevedoring practice, Captain Arthur, for the stevedore to ascertain the strength of the material composing a band before he attempted to lift the bale with it?

A. A stevedore is more interested in the strength of his hooks and his line and stuff that he is handling this with.

Mr. Byrne: I ask that that be stricken.

The Court: Strike it out.

Would it be proper practice to ascertain the tensile strength?

The Witness: Not of these here banded bales.

By Mr. Byrne:

Q. Why not?

A. Because they load it, it comes that way, it is shipped that way, and you got to use your hooks to discharge it that way, and you would not be trying to find out the strength of each and every band.

Q. I don't mean each and every band, Captain. In In other words, what you are saying is that it would be a proper stevedoring practice to go in and put hooks under a strap if (380) you didn't know whether it would lift fifty pounds or five hundred.

A. Yes, but the stevedore knows that. The stevedore knows that from his experience.

Q. How does he know it? How does he know it without a test?

A. Well, no doubt that has all been tested before. That has all been tested.

Q. In other words, you are then agreeing with me, Captain, that it would not be proper stevedoring practice to do it without some sort of test, scientific test?

Mr. Marshall: Objected to.

The Court: Objection overruled.

Mr. Marshall: If Your Honor please, Mr. Byrne is omitting the fact that the captain said he would learn that by experience.

The Witness: That is right.

• • •

(381) (Question read by the reporter as follows:

"Q. In other words, you are then agreeing with me, Captain, that it would not be proper stevedoring practice to do it without some sort of test, scientific test?")

The Witness: We don't test all our gear every day; we know what commodities we have to handle, and we know just what gear to use on that each and every day of that (382) operation.

• • •

Q. That wasn't my question, Captain. What I am talking (383) about is—a competent stevedore who warrants the quality of his own service—would he go in and attempt to put a hook under a piece of metal banding if he did not know the strength of that banding?

A. Well, the minute he picks it up he knows whether he is going to take that out or not, whether it is going to take that weight—the minute he picks that off the floor or out of stowage. If you lift that an inch you can lift it fifty feet, if you so wish, so that is the test right there.

Q. I see, and you think that is proper stevedoring practice?

A. That is stevedoring practice.

Q. That is stevedoring practice, but that wasn't my question. I ask, do you think that is proper?

A. Yes, that is proper.

* * *

(390) Q. Captain, one last question—two. I am sorry.

I show you Exhibit P-4 which shows two hooks (391) in a band.

A. Yes.

Q. Now, in your opinion is that proper? First of all—I am going to take it step by step—is it proper to have both parts of the hook pointing in the same direction?

A. It is not necessarily proper. This should be reversed, but regardless of what angle you put them in, they are so constructed, that with the angle they are constructed on they will pick it up in any position you like.

Q. Your answer is, then, that that is not proper—one of these hooks should be the opposite?

A. This one should be the other way.

Q. Should be the other way round?

A. Yes, because you are taking your strain like this.

Q. Now, Captain, does it make any difference for safety in lifting as to which bands the hooks are put in?

A. No.

Q. No?

A. No, you may put it in any one of the four bands, but principally the two center bands is mostly used, but there is times——

Q. Captain, are they just as strong or stronger than the two end bands?

A. The same.

(392) Q. So far as principles of engineering and physics are concerned?

A. Same strength.

Q. Does it make any difference where on the circumference of the bale you place the hooks?

A. As far as the difference goes the bale has got to lay flat in order to get them out. Your bales is laying flat to get them out.

Q. Captain, will you answer my question: I ask you if it made any difference so far as safety is concerned as to where on the circumference of the band you place the hook?

A. I have seen them taken out from on the sides, and on the centers, and all around.

By The Court:

Q. Yes, but does it make any difference?

A. No, it doesn't make any difference; your strength is there. Your strength is in them bands.

* * *

(397) By Mr. Marshall:

Q. Captain Arthur, from my notes yesterday I understood you to say that you have seen bales of burlap and other cargo banded with this kind of bands; is that correct?

A. Yes, sir.

Q. Did I also understand you to say that in your experience you had never seen one of the bands of this type and strength break during an unloading operation? Is that correct?

A. That is correct, sir.

* * *

(396) Q. And as a matter of fact, in your experience, when a ship comes into port do you have any idea how these stevedores are selected to board and work that ship?

A. They are selected by their gang foreman, those men.

Q. Right; and as a matter of fact on any ship, depending on the cargo, there might be different problems encountered in the unloading procedure; is that correct?

A. That is correct, sir.

Q. And would you say that is common practice to meet and to solve those unloading problems on the spur of the moment?

A. Between the chief officer and the stevedore, it is.

• • •

(400) Q. Then let me ask you this: Over the years of your experience, Captain, would you say that the ordinary custom and usage in the unloading of this type of cargo is for the stevedore hold men to use these two center bands of the bale? Is that correct?

A. Yes, yes; but they could also use the two outer bands. The same strength is there.

Mr. Byrne: The same what is there?

Mr. Marshall: Strength.

Mr. Borowsky: Strength.

By Mr. Marshall:

Q. But from your experience, Captain, you certainly would agree, would you not, that the two center bands and the use of them would meet with the custom and usage and practice with which you have been familiar over the years?

A. Yes, sir.

• • •

(404) By Mr. Marshall:

Q. Captain, assume that on July 1, 1955, the Atlantic & Gulf Stevedores by its stevedoring men were unloading bales of burlap weighing approximately 1000 to 1200 pounds by means of that hooking or a similar hooking device to what you see lying on the courtroom floor, namely the rope with the hooks, and by inserting those hooks into the center bands of these bales and having them lifted out by a steam winch.

I want you to assume that on this particular occasion that lift or that draft was being lifted in a straight, vertical lift with no tilting and no jerking and no hooking under any superstructure of the ship, or the coaming or anything else.

I will ask you, Captain, to assume that bands of the kind that are lying on the courtroom floor you had right there and they were used on that occasion. I will now ask you whether, assuming those facts to be true, you, from your experience, would regard that procedure as being a correct procedure for unloading this type of cargo.

A. Yes, I would.

• • •

(405) Q. (Continued) I am going to ask you, Captain, if that procedure meets with the practice which you have seen from your experience throughout the United States?

A. That is universal throughout this East Coast, Gulf Coast, and all around this Coast here.

• • •

(406) Q. Captain, from your experience would you regard this method of unloading this type of cargo as a safe method of unloading this cargo?

A. Yes, I would.

• • •

RE-DIRECT EXAMINATION.

• • •

(407) By Mr. Borowsky:

Q. The manner in which cargo is presented to the ship —is that a matter of concern to the officers of the vessel?

A. Yes, sir.

Q. And the placement of that cargo in the vessel, is that a matter of concern to the officers of the vessel?

A. It is.

Q. Doesn't the mate—how much of the safety of the ship depends upon the stowage and the proper stowage of the cargo?

A. The whole ship, as far as that does, depends upon the proper stowage of cargo.

Q. And is that one of the things that the officers are called upon to do when cargo is being brought aboard the ship, to see that it is properly stowed and where it is stowed?

A. They do that; yes, sir.

* * *

(408) Q. When there is a shipment of goods brought to the side of the ship, before it is loaded onto the ship do the ship's officers have an obligation to inspect the cargo to see that it is in proper condition to be handled for both the purposes of loading and for the purposes of unloading?

A. In the ship they have that obligation, but not on the pier. They don't go down on the pier and look at it.

Q. Well, now, if they find something coming onto the ship that cannot be safely handled either in the process of stowing it or in the process of removing it from the stow, (409) do the ship's officers have any obligation with respect to the cargo?

A. If the cargo is damaged and you can't handle it, no way of handling it, they have the authority to reject that damaged cargo.

Q. And do they bear in mind the particular method in which that cargo will have to be handled as far as discharging it is concerned?

A. In stowing it, you are referring to?

Q. Yes, when they take it on in the first place.

Mr. Byrne: Let the witness finish his answer. He said, "In stowing it?"

Go ahead, Captain. You cut him off.

The Witness: Yes, in large shipments you try to give them block stowage that is easily enough accessible to get it out.

By Mr. Borowsky:

Q. Do you also bear in mind the method of discharge that is going to be used in unloading the cargo?

Mr. Byrne: I object to this as leading, sir.

The Court: Objection overruled.

The Witness: What was that again?

(Question read.)

The Court: We don't want to go into this in too much detail.

(410) Mr. Borowsky: This is the last question, Your Honor.

Will you read the question, please, Mr. Reporter.

(Question read.)

The Witness: Well, now, you got me on a thing like that, because when they are loading it they have no idea on the other end what is going to be used to discharge it with.

By Mr. Borowsky:

Q. Suppose you know the practice?

A. If you know the practice and you know the run, yes.

* * *

(411) By Mr. Borowsky:

Q. What if any obligation does the chief mate have to the safety of personnel engaged in either loading or discharging cargo, from your observation and from your understanding of the responsibilities of a chief officer?

* * *

The Witness: He has as much authority there——

* * *

The Witness: In fact, more authority than anyone; he can have that stopped.

* * *

(413) Q. Could you tell us what if anything he should do under a circumstance that to him seems dangerous to these persons?

A. The first thing he would do would be to go to the stevedore who is working the ship and they would get together on it as to whether or not it was a safe method.

Q. Now, assuming they did get together on it and suppose the stevedore insisted that his method was all right and the chief mate felt that it was dangerous.

Mr. Bryne: In what respect dangerous? I object.

The Court: Yes, I think that is well taken.

Mr. Borowsky: Dangerous to the men involved in handling the cargo.

The Court: All right.

The Witness: Well, it is the mate's responsibility to stop it—to stop the work.

Mr. Borowsky: That is all.

RE-CROSS-EXAMINATION.

By Mr. Bryne:

Q. Do I understand that it is your testimony, sir, that if, let us say, the mate on a United States Lines' ship thinks (414) that T. Hogan & Company is doing a job in a way which might be dangerous—not that is dangerous but might be—and the mate went to the foreman of T. Hogan & Company who does the contract stevedoring for your employer, United States Lines, and the stevedore said, "This method is all right," and a lot of other things, and said, "We are going to go ahead with it," do you mean to tell me—and there is no damage to the cargo involved and no damage to the ship involved—do you mean to tell me that the chief mate of one of the U. S. Lines' ships would go down in the engine room and cut off the power?

A. If he——

Q. Just answer that question.

A. If he thought it was dangerous, he could.

Mr. Byrne: I ask that that answer be stricken.

The Court: Strike it out. Answer the question.

By Mr. Byrne:

Q. Please answer that yes or no.

Mr. Borowsky: You may answer yes or no and give your explanation.

The Witness: Yes. The answer is yes.

Mr. Bryne: The answer is yes.

* * *

(462) Mr. Borowsky: If the Court please, at this (463) time I should like to read into evidence portions of the deposition of the chief mate, Donald Quinn, taking at the instance of the defendant Ellerman Lines on November 6, 1957.

* * *

DEPOSITION OF DONALD QUINN.

"By Mr. Byrne:

"Q. Now, Mr. Quinn, did you at any time serve on board the City of Calcutta?

"A. Yes.

"Q. Were you on board the City of Calcutta when she was at Philadelphia approximately about July 1, 1955?

"A. Yes.

"Q. And what was your position on the ship?

"A. Chief officer."

* * *

CROSS-EXAMINATION.

By Mr. Borowsky:

(470) "Q. Now, who was in charge of the unloading of the cargo in Philadelphia?

"A. Well, it wasn't a question of there being someone in charge of unloading, there is nothing to supervise. I am only in charge of the stowage of the cargo.

"Q. Do you mean to say you have no responsibility with respect to the discharge of the cargo when you are at the port of destination?

"A. As long as the cargo is not being damaged, that's all my responsibility is."

* * *

(472) "Q. Do you mean to say you have no responsibility with respect to the discharge of the cargo when you are at the port of destination?

"A. As long as the cargo is not being damaged, that's all my responsibility is.

"Q. All right. Did you have any other officers stationed along the deck while the cargo was being discharged?

"A. Yes.

"Q. Whom did you have stationed?

"A. The second and third officers were both on duty and I was about the deck myself.

"Q. Where was the third officer stationed?

"A. He was standing on the foredeck at the time of the accident.

"Q. And that is his normal position when you are discharging, is that correct?

"A. Generally, yes.

"Q. The second officer was back off where his regular station is, is that correct?

"A. His regular station is aft.

"Q. And you as the person in charge of the discharging operation could move about the deck in either position?

(473) "A. Yes.

"Q. Now, one of the things you had to make sure, is it not true, is that the winches and booms and other unloading equipment was in good operating order and safe for us, is that correct?

"A. Yes."

* * *

"Q. Well, now, I ask you whether or not you regarded it as your obligation to see that this equipment was safe not only for the handling of the cargo itself, but for the safety of the men who were called upon to handle it?

"Mr. Bryne: What equipment, Mr. Borowsky?

"Mr. Borowsky: Any of the cargo handling equipment that was furnished by the ship.

"A. Any cable belonging to the ship was in good condition for cargo handling.

"By Mr. Borowsky:

"Q. I ask you did you regard it as one of your obligations to see that it was safe to be used by the men who came aboard the ship to use it?

"A. Yes.

"Q. Now, you are in charge of the entire operation, are you not, while it is taking place?

"A. What operation?

(474) "Q. The loading of cargo when the loading of cargo takes place aboard a vessel and the discharge of cargo when the discharge of cargo takes place."

• • •

"Q. Will you please answer the question.

"A. As far as I am aware, I am responsible, or the ship is responsible for the cargo once it gets over the rail of that ship, and when it gets over the rail my responsibility ceases.

"Q. Aren't you the person appointed by the Captain to see to it that the cargo is handled properly and safely from the standpoint of both the cargo of the ship and the personnel engaged in doing the operation?"

• • •

"A. I said I think my responsibility is for the cargo and the ship, and to make sure the gear is fit, and for the humans to be working on it.

"Q. The Captain imposes that obligation on you?

"A. Yes, every officer, every ship's officer.

(475) "Q. You are the Chief Officer?

"A. I am in charge of them, yes.

"Q. The Captain does not take any active part in this operation, he delegates it to you?

"A. Very often he does.

"Q. Isn't it customary for the Chief Officer and his subordinate officers to take care of just this type of operation, the discharging and the loading operation?

"A. That's correct.

"Q. The Captain may be off——

"A. That's one of our duties.

"Q. The Captain is very often off the ship doing business that he had to do with customs and the other business of the vessel while that is being reposed in your care, is that correct?

"A. Yes.

"Q. Now, do you mean to tell us if you see an operation being conducted in connection with the discharge of cargo that is dangerous, that you have no authority or power to stop that operation?

"Mr. Byrne: I object to the question; split it.

"By Mr. Borowsky:

"Q. First of all, do you feel you have any authority to stop (476) that operation?

"A. If you knew a person was going to get hurt you would try to stop it somehow, but if you don't know, you can't. You might see a man crossing the road. . . .

"Q. If you knew a man might be hurt in this operation you had the authority to stop the operation, did you not?

"A. No, I did not. I could only advise. As I mentioned in an earlier statement, I told him that one of his men might get hurt and he said it was their responsibility, and in any case they were running clear, they knew the danger of it.

"Q. Mr. Quinn, please answer me this question. Did you attempt to direct the person whom you have identified as the one in authority of the stevedores, not to do the work in this manner?

"A. I suggested to him he should not do it that
y.

"Q. Did you direct him not to do it?

"A. I can't.

"Q. Did you attempt to direct him not to do it?

"A. What do you mean, by using force or some-
ng?

"Q. You knew that if you gave him an order to
which he failed to carry out, you could shut off the
wer, didn't you?

"A. If it would be danger to the ship, yes.

"Q. In other words, your criterion as to the au-
rity that you had, would be to stop an unsafe op-
ation if it endangered (477) the cargo of the ship,
t if it endangered the personnel handling the cargo
u had no authority to stop it? Is that what you are
ling us?

"A. As far as the ship is concerned, that's all I
responsible for.

"Q. If somebody gets hurt doing the ship's work,
en you feel you have no responsibility toward him,
that correct?

"Mr. Byrne: I object to that."

The Court: Objection overruled.

"A. I mean, it doesn't matter. In that case you
uld never discharge a ship, there is always a certain
ment of danger in it.

By Mr. Borowsky:

"Q. Didn't you just say if you thought someone
uld be hurt, you would have?

"A. You said it.

"Q. You would have directed him to stop?

"A. You said that, I didn't.

"Q. If you thought someone would be hurt, would
u have directed the stevedores to stop discharging
e cargo in that manner?

"Mr. Byrne: That's objected to."

The Court: Objection overruled.

"A. I don't see how you can answer a question like that.

(478) "By Mr. Borowsky:

"Q. Mr. Quinn, how many times have you been in the Port of Philadelphia with a vessel of the Ellerman Steamship Lines bringing in a cargo of gunnies?

"A. A dozen, I suppose.

"Q. And who were the stevedores that discharged the cargo on those occasions, those dozen occasions?

"A. They were clerks in New York as far as I know. I don't know just who they were, but it wasn't Atlantic and Gulf.

"Q. With respect to the discharge of the cargo in New York, the gunnies, weren't they also discharged by means of hooks?

"A. Yes.

"Q. And isn't it a fact that when the cargo was discharged in Philadelphia on previous occasions, it was done in the same manner as it was done on this day?

"A. Yes.

"Q. So that when that cargo was put aboard the vessel in India, you knew or had a right to know, or believe, it would be discharged by means of hooks in Philadelphia, is that correct?

"A. I expected it would be discharged by hooks.

"Q. Now, isn't it a fact that the stevedores came aboard this vessel at 1300?

"A. Yes.

(479) "Q. That's 1:00 P. M.?

"A. Yes.

"Q. And sometime between that hour, 1:00 P. M. and 1620, the accident occurred?

"A. Yes.

"Q. Were you on the deck of the vessel during that period of time?

"A. Part of the time.

"Q. Did you take note of the manner in which the cargo was being discharged during that duration of three or four hours?

"A. Yes, they were going very quickly.

"Q. And all of the discharge was being done in the same manner, is that correct?

"A. Yes.

"Q. By means of the hooks?

"A. Yes.

"Q. Did you have an opportunity to look down into the No. 1 hold at any time prior to this accident and see what the condition of the discharge of the cargo was from that orlop deck?

"A. Yes.

"Q. How much of the cargo had been taken out on the occasion when you last looked into the No. 1 hold before you were advised (480) of this accident?

"A. That's very hard to judge. You only go by the time. When you look down into the hold, you can only see the flat surface, you don't know how deep the cargo is.

"Q. Had they removed any cargo from the wings?

"A. They had removed some, quite a bit."

* * *

(490) "Q. Had they removed any cargo from the wings?

"A. They had removed some, quite a bit.

"Q. And had they removed any cargo from the front portion of the hold that was underneath the deck?

"A. Underneath the deck, you mean in the orlop deck, now?

"Q. Yes.

"A. Any cargo in the front of the orlop deck?

"Q. Yes.

"A. I don't think there was any cargo there, or very little.

"Q. How about in the aft end of the orlop deck?

"A. There was space there because that's where the men dashed for shelter, and that's where Leighton Beard was when I went down there.

"Q. Now, isn't the method of discharging gunnies in the same general category as the discharge of cotton, wool and cork bales?"

* * *

(491) "Q. From your experience, aren't the discharge methods used to hoist cotton, wool, cork, and gunnies in the same class?

"Mr. Byrne: Where?

"The Witness: In Philadelphia, do you mean?

"By Mr. Borowsky:

"Q. In Philadelphia, New York, or anywhere in Great Britain.

"A. I have only been to a couple of ports; I haven't seen gunnies discharged in Britain. When I am in Britain I am home on leave, and then I rejoin the ship when she is ready for sea again. But in America, yes, it's the general practice.

"Q. Isn't it a fact, sir, where there is working space where the men can get into the wings, while the bales are being hoisted out of the hold, that it is customary and perfectly all right to use hooks in the bands or fastenings of bales of cotton, wool, or gunnies?

"A. It's done."

* * *

(492) "Q. Are you familiar with—you say that in New York they use the hooks; is that correct?

"A. Yes.

"Q. In Philadelphia they use the hooks?

"A. Yes.

"Q. Did you examine the bands that broke on this particular occasion?

"A. No.

(493) "Q. Do you know how many bands broke of that particular bale?

"A. No.

"Q. You made no notation in your logbook as to the nature of the accident, how it happened, or what was involved in the accident?

"A. No, I just got the name of the man who was injured.

"Q. Is it customary to put in your logbook almost contemporaneously with the event, the details of an accident?

"A. If you know them.

"Q. There was nothing preventing you or any of your subordinate officers from finding out what had taken place on this occasion, was there?

"A. We knew that he hurt his leg and had gone to the hospital.

"Q. From the appearance of these bales, did they appear to you to be of the general kind that you had carried on previous occasions?

"A. Yes.

"Q. The same size, same weight, same manner of fastening?

"A. Yes.

"Q. Do you know how many bales were being removed at a time from these holds in Philadelphia on July 1, 1955?

"A. I wouldn't like to say, but three or four, I imagine.

(494) "Q. You are not sure?

"A. No.

"Q. The quantity of bales being removed, however, did not tax the facilities in removing them, that is, the winches or the booms or anything of that kind?

"A. Obviously not, because there was no trouble with them.

"Q. If you thought that there would be any overloading, you would have called that to the attention of the stevedores, is that correct?

"A. Yes.

"Q. And if they did not heed your admonition that it was too much for the equipment you would have ordered them to desist, is that correct?"

• • •

"Q. I am talking about the winches and the booms and the discharging equipment.

"A. I am responsible for the ship's gear, and if I think it's going to be too much weight to break those, I naturally stop the work. I am only responsible for my ship's gear.

"Q. Do you know how the cargo was discharged after the (495) accident?

"A. The same as before."

• • •

(510) Mr. Marshall:

"Q. All right. You told us you recalled about a dozen or so occasions when gunnies were being unloaded,, is that correct?

"A. Yes.

"Q. Prior to this time?

"A. Yes.

"Q. And on those dozen or so occasions, what method was used for discharging this same type of cargo?

"A. The same way as what was done this time.

"Q. And were these occasions here in Philadelphia exclusively, or were you referring to also New York and other eastern ports?

"A. All eastern ports.

"Q. And can you tell us, Mr. Quinn, whether that is the only method of discharging this type of cargo with which you were familiar, either in Philadelphia, New York, or the eastern ports of this country?

"A. Yes, that's about the only method I have seen them use."

• • •

(515) "Q. All right. My question, and I would like you to answer it as best you can, you have no recollection of any gunny bands breaking that afternoon?

"A. No."

• • •

(516) "Q. Prior to the accident.

"A. Yes.

"Q. That's what I mean.

"A. I never saw any bales actually come apart, any bands come apart on the gunnies."

• • •

(517) "Q. As a matter of fact, can you tell us, Mr. Quinn, whether or not it would be impossible for two, three or four or five men to get ahold of one of those bales, with their hands, and pull it from its position?

"A. Well, they are stacked by four or five men in India.

"Q. Stacked in position with the aid of lifting equipment?

"A. No, they are moved by these people in India.

"Q. And can you tell us whether or not you have ever observed unloading of this type of gunny bales by men pulling these bales out of their position by their hands?

"A. I have never seen it done, no.

"Q. Any place in this country?

(518) "A. No.

"Q. Or in England?

"A. I have never seen them in England.

"Q. Would the average bale weigh about a thousand pounds or slightly more or less than a thousand?

"A. Yes, about a thousand."

• • •

(523) Mr. Marshall:

• • •

"Q. I am asking you specifically, did you give him any criticism as to the use of the hooks in the bands on these gunnies that were being unloaded prior to this accident?

"A. Well, I know I did on the wool. But whether I mentioned it again to the gunnies, I couldn't recollect.

"Q. You have no recollection as to that, as to the gunnies?

"A. I had already discussed it with the wool bales, the same idea; I may have done it, but I can't recollect specifically mentioning it," to him.

• • •

(533) EVIDENCE ON BEHALF OF THE ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.

PAUL J. KEELER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Byrne:

Q. Mr. Keeler; what is your business?

A. I am a marine consultant.

Q. Are you connected with any firm?

A. I am self-employed.

Q. Where is your office?

A. My office is at 149 Broadway in New York City.

Q. Have you had any experience as a stevedore?

A. Yes, I have.

Q. Will you tell the Court and jury what experience you have had as a stevedore?

A. My total experience in the marine field?

Q. As it pertains to stevedoring operations, please.

A. I left the sea in 1933. I was brought ashore on a training program by a steamship company and I was at that time working (534) as a longshoreman, a winch driver, a hatch foreman, and assistant superintendent, and superintendent. I was a checker and a clerk at one time. Then I became superintendent of Pier 2 North River, and in 1936 —or in 1936 I was made superintendent; in 1938 I was made traveling stevedoring supervisor for the steamship company, and in 1941 I was made assistant to the general manager of operations, and on April 1 of 1945 I resigned that position and I went as marine superintendent of the John W. McGrath Corporation.

Q. Is that a stevedoring firm?

A. Which was one of the largest stevedoring firms in the world. In May of 1953 I was made vice-president in charge of operations of the company, and I resigned in October of 1954 to form my own company.

• • •

(557) By Mr. Byrne:

Q. Now, Mr. Keeler, you are familiar with the method of unloading cargoes and particularly cargoes of gunnies in bales, as it pertains to the, shall I say, eastern seaboard of the United States?

A. Yes, I am.

Q. And this method of using these hooks, is that a fairly common method?

A. Yes, it is.

• • •

(565) PAUL J. KEELER, recalled.

CROSS-EXAMINATION.

• • •

By Mr. Borowsky:

Q. Mr. Keeler, most of your experience has been in and about the Port of New York City, is that correct?

A. Most of it, yes.

• • •

(571) Q. Well, sir, it is the practice to use two hooks, is it not?

A. Yes; that is right.

Q. And it is the practice, as you have apparently heard while you were sitting in court, in the Port of Philadelphia to use two hooks?

A. That is right.

Q. Now, none of these Codes tell you where to put the hooks, do they?

A. By putting the hooks, counsel, do you mean on what part of the band or under the band?

Q. Yes; no code particularizes how the hooks shall be inserted or in what bands, or anything of that kind, do they?

(572) A. Gee, I would have to look them up; I don't know whether they would say put them under the band, or just leave it out, or hook two bands up—I think I remember one saying that two hooks were not to be put on one band.

Q. All right; but is the purpose of using two hooks as opposed to one hook?

A. The additional safety factor of two bands.

Q. What is the additional safety factor? In what way does the use of the two hooks increase the safety?

A. By splitting the load in half on each band that is hooked up.

Q. Is it also true that if one band breaks the other hook in the other band will hold the load?

A. That is right. That is theoretically what it is supposed to do.

• • •

(576) Q. Every time you lift a bale of gunnies you have two stress factors, one on the rope and one on the band to which that rope is attached by hooks; is that correct? They are both going to stretch; isn't that correct?

A. Tensile strength or stress, yes.

Q. Tensile strength is merely the stretching of an object to the point where it is going to break, and that is what we call its breaking point; isn't that correct?

A. Yield point.

Q. Yes; when we are talking about things like rope and steel, that is the quality of it when you are going to test it for tensile strength, so that when you lift up the rope is being pulled and the band is being pulled, and both of those materials (577) are stretching to some degree; isn't that correct?

A. That is right.

• • •

Q. All right, first take the bands. Is there any more stress on the bands?

A. Yes, there is a different condition of stretch on the band, and tension, under certain conditions, by hooking up the two middle bands and not possibly driving the hooks completely in.

Q. No, no, let us talk about the hooks. Let us say the hooks are in, in both cases.

A. All the way?

Q. Equally well, yes.

A. I would say that the tension is probably a little less on the two inner bands.

Q. Suppose in the course of taking that bale out one of the bands would break, wouldn't the band that is closer to (578) the center of gravity hold that bale better than one which was subjected to two forces, the immediate shift-

ing of the bale all the way over to one end and holding it on one end band as opposed to one closer to the center?

A. I would go along and say probably that the one in the middle would hold better, yes.

Q. Now, actually, talking again about the strength of bands, it doesn't make any difference whether the hooks face each other or whether the hooks are away from each other; isn't that a fact?

A. No, sir.

• • •

Q. All right, in what degree is the stress any more on the bands if the two ropes are coming off the center rope at the same angle into the bands at the same position away from the center of the bale, whether one hook is facing this way and the other hook is facing the other way?

A. The difference is this, that you always are facing the possibility when you do that, that the point of the hook will nick a band. If you don't drive it in with that action I am talking to you about there is a possibility——

(579) Q. Wait a second; you are introducing a factor here that I haven't asked you.

• • •

Q. I haven't asked you as to the manner in which the band fits on top of the hook; I am merely asking you if in the lifting operation the hooks are in the bands in the proper way, they are now facing each other—one is this way and the other hook is facing this way—is there any difference on the stress on the band as opposed to the hooks being this way?

A. I would say no.

• • •

(528) Q. You know when a band breaks it is due to stress; isn't that correct?

A. That is right.

Q. So what is wrong with a question that tells you when you have the greatest stress the bands will break most? Isn't that correct?

A. The easiest strain you get on any bales, counsel, is the first ones you pull out from the top stow directly under the deck. The toughest one can be loaded over a peak of ore, and it can be the last one you pull out on the bottom.

• • •

(592) Q. Now, do you agree that in order not to damage the burlap on these bales you cannot use hooks with sharp points?

A. A round point—yes, you are right

Q. You have to use round points?

A. Chisel points on the bands.

Q. So that if you had to remove a bale that had no bands around it you would have to rig some sort of sling around the bale in which you could fasten the hook?

A. Or use a net.

Q. Yes, but I mean if you wanted to move the bale without a net you would have to put a sling around it and put the hook in the sling, or a rope of some kind.

(593) A. Yes; well, you would lay the sling out and try to tumble the bale into it.

• • •

Q. You could do that, but the reason you don't do that is because the bands are there on the bale; you merely take your hook and put it in the band.

A. That is right.

Q. So that the band takes the place of the sling in my example?

A. Well, you could not use the sling in some conditions; (594) you could not get some bales out of the ship at all with a sling.

Q. Then this is better than a sling, the band?

A. This is the only thing you can use in certain instances.

Q. It is just as important to this operation as a nut would be to a bolt; is that correct? You couldn't use the hooks unless you had the bands?

A. No, not on burlap; you would damage the burlap if you were to put the hooks into the bales.

Q. And those hooks are designed for the purpose of fitting into these bands, are they not?

A. Yes.

Q. And the bands are designed to be used with these hooks, are they not?

A. Well, now, that I don't know.

Q. Well, this has been going on for many, many years; isn't that correct?

A. Yes, but I don't know that the Indian Government designs them for——

Q. Well, you know that the shipping company that hauls the material knows the manner in which it is being unloaded, do you not?

• • •

(595) The Witness: Yes, I presume they do.

• • •

(597) Q. Suppose you put the cargo in, in such a manner that it might shift at sea and endanger the ship, so that the ship might founder; is it proper for the chief officer to say, "Now look; we want these things chocked; we want these things properly dunnaged"; is that proper for a chief officer to say?

A. The end result of the loading is the chief mate and the master and the other licensed deck officers' responsibility. There are probably—if you gave the ship with any different cargo to twenty different stevedores all twenty of them would load it in a different manner. If you ask twenty deck officers for their advice they would probably come up with twenty more manners, all of which would be seaworthy. Now, a master or a mate does not argue with anything except what he considers to be the end result of stevedoring, and putting weights or blocks of cargo in a

ship that do not look seaworthy in (598) transit. He will then go to the superintendent stevedore and discuss it with him, and the first one to change will be the stevedore.

• • •

(599) Q. I am asking you a question based upon your own knowledge and experience, sir. What is your knowledge and experience? Something that is going on, on the ship, that is harmful, dangerous to cargo, or the ship's gear, or the ship's safety? Does the chief officer have authority and power to stop that operation by the stevedore?

A. I would say he had the power after talking, in the event that it is not a critical situation, of course, that any sane, common sense man would realize, and a situation such as that brought to the stevedoring men's attention—they are the ones that are going to get hurt; they recognize it as soon as it is shown to them; and there is no need to fight about something that is——

Q. Wrong?

(600) A. —really and actively dangerous at that moment.

Q. And if the stevedore——

Mr. Byrne: Don't interrupt him, please. Go ahead, Mr. Keeler.

The Witness: But just a situation in the loading which the mate may think is dangerous or had some reason to believe it dangerous, his first duty is to get the superintendent of the stevedoring company and consult with him, and the fellow is right there either on the ship or on the dock all the time that the loading is going on.

By Mr. Borowsky:

Q. And if the superintendent still does not agree with the chief mate, and the chief mate feels very definitely that this is going to be a dangerous situation to the lives of the men that are going to be under his command when they put

to sea, or to the damage of the cargo, so that the shipper is going to say, "Hey, I gave you six loads of this and I got back four and a half, because they have been all damaged, and there is mud on them, and oil on them, and they have been touched by other cargo," and so on, isn't it his duty to say to the stevedore, "Now, look here; this is the way it has to be done, and if you don't like it, I am sorry; you do it my way or I cut off the power and you don't do anything"? Isn't that a fact?

A. I have never had the experience where they said that.

* * *

(608) By Mr. Marshall:

* * *

Q. Would you agree with me, Mr. Keeler, that these India burlap bales come in a uniform shape and size?

A. No.

Q. All right, what different sizes have you seen, limiting yourself only to bales of India burlap?

A. Well, I have seen net gunny and the double gunny.

Q. Oh, then, there are two sizes?

A. Yes.

Q. And have you seen—the pictures that you have there I assume would be the single gunny; is that correct?

A. That is right.

(609) Q. Are you more familiar with unloading that type of gunny than the double gunny?

A. Yes; these are more common.

Q. Those weigh about a thousand pounds, don't they?

A. A thousand and ninety.

Q. 1,090 pounds?

A. Yes.

Q. That is about the average weight, isn't it?

A. That is right.

Q. In all that experience, Mr. Keeler, have you ever seen any other method used for unloading bales of India

burlap that had four wire straps retaining those bales other than the method which you have heard described in court, and which you have seen, by the use of these hooks and cables?

A. As a usual way of discharging, no.

* * *

(611) Q. As a matter of fact, these hooks and this rope device were an improvement over prior methods, and this resulting hook and rope device was the end result of improvements that were made under your supervision while you were with McGrath Company; isn't that correct?

A. That is what I said. I think that is right; yes.

Q. And wouldn't it be fair to say, Mr. Keeler, that if there was a better or a safer method of unloading this type of cargo that you would be one of the ones who would be trying to improve on it?

Mr. Byrne: Objected to; it is a forked question—better and safer.

The Court: Objection overruled. We have to move along. The objection is technical.

By Mr. Marshall:

Q. Do you understand the question?

A. Yes.

Q. Would you answer it, please?

(612) A. Well, counsel, by "better" what do you mean?

Q. By "better" I mean more efficient, I mean more safe.

A. There is no more efficient way than that.

Q. All right; is there a more safe way than that, that you know of—than by the use of these hooks and ropes?

A. If the bands don't break through misuse of the winches or the men or the conditions of the stowage or something, I would say the bands are just as safe as the rope, provided that if you broke, for instance, one band hauling out, that you stopped in the square and rehooked it up and made sure that when they were free and in the square, as

you touch them down preparatory to lifting them, that you reinserted each hook and made sure that you had two hooks on a bale, and the longshoremen know, too, that when they are working with hooks that they stay clear.

Q. All right, would you then agree with me, sir, that the use of these hooks and ropes, by the use of these hooks in the bands, using double hooks and double bands per bale, as far as you know from all your experience, assuming, of course, that the stevedores are not careless, that they don't jerk the bands, would you agree with me that that is the safest method you know of unloading this type of cargo?

A. Yes, I would say the safest customary method.

Q. All right, sir; as a matter of fact I think you told (613) us that you had some experience or information, that as many as ten bales on the average fall from every 500; is that correct?

A. That is right.

Q. And am I to assume, sir, that information is gained from your experience and knowledge of operations of this kind in the New York Port?

A. And in other ports too.

Q. All right, sir; I will ask you to assume these facts: Assume that the Atlantic & Gulf Stevedores commenced unloading this operation at about one o'clock on July 1, 1955, and that the operation continued in progress until about 4:30; that after a delay during which this injured man—and you heard the testimony—was removed by this tray, and immediately after his removal operations again resumed and continued on until about 6:30; I will ask you to assume that that operation took over a period of five or five and a half hours, and from the evidence it looks as though the work was being done with reasonable dispatch—in fact, there has been some testimony that it was fast—in that period of time, assuming that the operation continued during that period, if the facts are that the only bands which broke were the two that were involved in this case, would you not agree with me, as contrasted with the New York

record which you are familiar with, that this (614) was a safe operation by the Atlantic & Gulf Stevedores?

A. Yes.

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(617) Q. Now, as a matter of fact you told us that you had had considerable experience with contracts between stevedoring companies and shipping companies; is that correct, Mr. Keeler?

A. That is right.

Q. I want you to tell this jury if you know of any contract in existence between a stevedoring and a shipping company which requires the stevedore to unload bales of burlap by any method other than was used in this case.

• • •

(618) The Witness: The methods used by the stevedore are not included in any contract. The rate is in the contract, but not the method.

• • •

Q. So that the answer is that you know of no contract which specifically contains a provision dealing with any method of unloading this particular type of cargo; is that correct?

A. That is right.

Q. And if that is the fact isn't it also a fact that you know of no contract which calls for or requires a stevedore to unload this kind of cargo in a method other than what was used in this case?

A. No.

Q. By that you mean you know of no such?

A. No; that is right.

• • •

(619) Q. I have one or two more questions. Yesterday you told us, Mr. Keeler, you considered the way that had the

least strain on these bands was by putting the hooks at the corner of the bale; is that correct?

A. Well, catercornered.

• • •

(620) Q. As a matter of fact, wouldn't you agree with me that it would be absolutely impossible to place one of these hooks under a band at the corner of a bale?

A. It would be impractical, not impossible.

• • •

(652) A. W. GROSVENOR, having been duly sworn, was examined and testified as follows:

(653) DIRECT EXAMINATION.

By Mr. Byrne:

Q. What is your occupation?

A. Professor of Metallurgical Engineering, Drexel Institute of Technology, and consulting engineer.

Q. Mr. Grosvenor, what training have you had as an engineer?

A. I am a graduate in metallurgical engineering from Ohio State University and have taken some graduate courses at the University of Pennsylvania in stress analysis.

Q. Mr. Grosvenor, at my request did you examine certain steel straps?

A. I did.

• • •

(655) Q. Will you tell the Court and the jury what tests you made, please.

A. I made what is called a tension test. I cut approximately a 1 foot length from the band; then that band must be gripped or held in the machine which causes a little tearing action. To avoid the band breaking then at the point where it is gripped we machine the band to a little narrower width. That is, I machined it from the 1 inch width down to ¾, gripped one end in the jaw of the machine, and on the other end also gripped the end, and then the two ends were

gradually pulled (656) apart while the force was being continuously measured. Since the center section, a length of some 6 inches, had been machined down a little narrower—not thinner, but merely narrower—naturally, the bar broke at that point. Well, that, of course, requires a slightly smaller load because of the fact that the band has been machined narrower, so by measuring the original dimension and measuring the machined dimension a ratio can be established.

Dividing by the machined area into the load gives us the load in pounds per square inch. Now, that, of course, can then be converted to the force necessary to break the actual band. I could have tested the band itself without the machine, but it probably would be pinched at the point of gripping and would break at that point, and the full strength not realized, so it would be an unfair test.

Q. Is the test you applied recognized in the engineering profession?

A. Yes, it is a standard engineering test specified by the American Society for Testing Materials and in common use throughout the world.

Q. Is the manner in which you made the test accepted in the industry?

A. Yes, it is quite standard.

Q. And what did you find is the tensile strength of the band (657) which you tested?

A. The full width band would carry a load of three thousand seven hundred pounds—thirty-seven hundred pounds.

Q. And did you also test this particular band for yield strength?

A. Yes, I did.

Q. What was that? What was your finding there, sir?

A. I will have to look at my notes. I think it was—now, unfortunately, Mr. Byrne, I first have expressed the strength of this in pounds per square inch. In pounds per square inch it was 56,500 pounds per square inch. If we had

had a complete square inch of material it would have been 56,500 for the yield strength, and the tensile strength 69,300 pounds per square inch.

Q. Now, did you reduce those figures to the size band with which you were dealing?

A. I have to multiply it out, Mr. Byrne.

Mr. Byrne: Perhaps you won't object if I let the witness refresh his recollection from this. (Showing counsel.)

Do you agree that he may refresh his recollection as to the figures or not?

Mr. Marshall: May I see it? The figures?

Mr. Byrne: Yes.

(658) Mr. Marshall: Do you want to block the rest of it out?

Mr. Byrne: No.

Mr. Marshall: Then I will, if you take that attitude.

Mr. Byrne: Do you have any objection, Mr. Borowsky?

Mr. Borowsky: No, I have none.

By Mr. Byrne:

Q. Mr. Grosvenor, if I show you a report addressed to me under date of April 7, 1958, does that refresh your recollection as to the figures—just the figures, sir?

A. Yes, the yield point—that is at which the plastic deformation began—plastic stretching began—was 3,030 pounds at the breaking strength or maximum load it would carry without breaking is 3,700.

* * *

(682) CROSS-EXAMINATION.

By Mr. Borowsky:

Q. Dr. Grosvenor, do you find that often results in practice are quite often different from those elicited in the laboratory?

A. Yes, sometimes.

Q. Very often people who do not have the benefit of scientific knowledge learn by trial and error, the so-called "experience method"; is that correct?

A. That is right.

Q. And the interplay of forces which you have described today is not usually well understood by the lay person: In other words, he knows that if he lifts something in a given way and it comes out that way, it is perfectly all right; he doesn't appreciate the differences by the force being applied at an angle, or the multiplication of forces by jerking, or many of the other things that a scientist does; isn't that something that you have learned from your experience dealing with students and people to whom you present an experiment of this kind—that they are quite surprised?

A. Well, if you, Mr. Borowsky, are limiting the question to (683) a person who might occasionally lift a load, I wouldn't say that applied to a person who regularly does, day in and day out; he soons learns.

Q. Suppose his experience, however, is such that it is a comparatively safe thing to do, and suppose that the experience through the industry is that it is a safe thing to do, and as a matter of fact it becomes a part of the safety code for the industry; wouldn't you say that it is reasonable to continue on in that method?

Mr. Byrne: That is objected to as a question.

The Court: What is the basis of your objection?

Mr. Byrne: Well, a number of things, sir; but particularly the inclusion within it of something that goes into part of the safety code of the industry. Try as Mr. Borowsky will, he cannot make that little blue book say that.

By Mr. Borowsky:

Q. Well, suppose we refer to the rule book. I would like you, please, to look at this handbook which purports to

be the Maritime Safety Code for the Port of Philadelphia, and I refer to Paragraph 4 on Page 25. Doesn't that say that in the discharge of bales of gunnies two hooks shall be used?

Mr. Byrne: I object. Let us see what it says.

By Mr. Borowsky:

(684) Q. All right, do you want to read it, sir, out loud?

A. Bales of cotton, wool, cork, gunny bags or other similar articles shall be hoisted by double hooks at all times.

Q. Now, would you say that if that safety code provision has been prepared for the industry that it is logical to deduce that experience has indicated that that is a safe method of doing the work?

Mr. Byrne: That is objected to, sir.

The Court: No, he is an expert in his field. He can say whether it is or is not.

The Witness: I would say, if that is the published method, it is expected, then, that persons called upon to hoist such loads would follow the published——

By Mr. Borowsky:

Q. And you have been in court for several days, and you have heard described the method by which these bales of gunnies were discharged, have you not?

A. Yes.

• • •

(688) Q. All right; when that bale reaches the end of its row and falls down under the rope then you have a much greater force, do you not?

A. Well, I don't know——

Q. Because you have a jerking and a holding.

A. I don't know whether it is greater or less, but you would have a force on slow hoisting without jerk—the force would be the weight of the bale. If it is jerked then the force is greater than the weight of the bale.

Q. Would you say many more times when it is jerked in lifting?

A. I would say up to two times.

Q. So that you would expect more bands to break when you are pulling them out of a high stow and they drop down than you would if you were lifting them straight up, would you not?

A. No, I didn't say that at all. I said that I don't know what the force is to pull it out of stow.

Q. But you do recognize that there is an interplay of forces which may in practical experience indicate as Mr. Keeler testified that they break four times as much when they are being pulled out of stow as when they are being hoisted out of the hold?

A. I heard him say that, yes, but I can't answer from my (689) own experience or knowledge.

Q. So that is an instance where the laboratory and the experience in the business may differ; you cannot say, unless you have conducted the experiment, and the people who have seen it done can make their own conclusions, can they not?

Mr. Byrne: I object. There are two questions. They should be separated.

The Court: Yes, I think it is pretty circuitous.

By Mr. Borowsky:

Q. Let us forget about it. Let us get down to the flat side of the bale. You have heard it testified that you cannot push the hooks in at the corners, have you not?

A. Yes.

Q. So that the corner method is apparently impractical, even though theoretically it could be used?

A. It seems so, yes.

Q. When you are trying to put the hooks on the flat side of the bale it doesn't make any difference whether you put the hooks in the two center bands or the two end bands?

A. I would say that there is less stress on the band in general if it is put in the two center bands, than if it is put

in the two outside bands. It doesn't create as much twisting of the band; it is a more nearly vertical lift.

(690) Q. Now, knowing that these bands are to be used to discharge this cargo by means of hooks, is there any means available, or any method that you can think of, that could improve the discharge of the cargo?

Mr. Byrne: That is objected to.

The Court: I don't believe he has the background and the experience on discharge of cargo.

Have you? Let us ask him.

The Witness: No, sir; I have had experience in hoisting loads in a plant or factory—that sort of thing—but not aboard a ship. I am a landlubber.

• • •

(697) Q. All right; the accepted way to discharge these bales is by means of hooks into the bands. Now, is it possible to put a band around this bale not that tight that it would reduce its ability to withstand the stress of lifting as you have mentioned it to be, and still stay around the bale?

A. From the standpoint you mentioned, yes, it would lessen the stress in the bale, but you run into another hazard that the band is now loose and could slip, and another type of hazard would be introduced. I don't think that is a practical solution.

Q. Well, do you have any practical solution?

A. No, sir; I have no particular interest in this type of industry. I am a consulting engineer. If somebody wants to hire me for the job I will undertake it.

Q. I think, sir, that you have explained the various factors of stress to us that you encounter, and I would like to (698) just summarize. Is it not true that the least amount of stress that will be placed upon the bands is when they are being lifted vertically with a straight steady pull with the hooks in the two center bands of the bale.

A. You are relating that to other conditions of lifting, now?

Q. Yes.

Q. You have explained to us the dangers of lifting at

Q. You have explaine dto us the dangers of lifting at angles, jerking, other forces that might come into play under varying conditions; now I ask you whether under a straight up lift of a bale with the hooks in the center two bands, is there not the least strain of any method of lifting?

A. I think that is true; yes. That is, compared to lifting only.

* * *

(710) By Mr. Marshall:

* * *

(711) Q. I understood you to say, sir, that from an engineering point of view the proper safety factor in matters generally, where safety devices or lighting devices are concerned, should be on the ratio of about four or five to o . .

A. About five to one for a moving load.

Mr. Byrne: Keep your voice up. What was that answer?

The Witness: About five to one for a moving load.

By Mr. Marshall:

Q. Yes. And this would be considered a moving load?

A. Yes.

Q. Would you say, then, that assuming that these bales are 1,090 pounds, or let us say 1,100 pounds in weight, and that we are using two bands under normal conditions, each band would be supporting roughly half of the total weight.

A. That is right.

Q. So that the band, to meet the engineering safety factor, would have to be four or five times 550 pounds?

A. That is right.

Q. If these bands had such a safety factor of four or five times the 550-pound weight would you state your opin-

ion as to whether you would regard those bands as safe if used in the (712) manner which has been described in this courtroom?

A. They would be safe for a straight vertical lift with no shock——

Q. Right.

A. —and no twisting of the band.

Q. All of my questions, Mr. Grosvenor, so we all understand you, are intended to apply to a situation where we are lifting vertically and with no outside influence such as jerking or hooking or jolting or anything of that sort.

Mr. Byrne: Do you include also twisting of the bands?

Mr. Marshall: Yes, it would include that type of twisting which you describe, namely, that unless the band were seated in this hook as you described it that there would be a certain amount of twisting in that band.

The Witness: That is right.

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(715) RE-CROSS-EXAMINATION.

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(717) By The Court:

Q. Let me ask a question. These bales as they are lifted out of the square of the hatch are three in number. Would you say that their joinder, for want of a better phrase, on the way up, three of them—what is the likelihood of pull being on one more than the other? What would be requisite to have an equal pull, an equal tensile strength being distributed (718) equally amongst the three bales?

A. I would say it would be extremely rare if it were distributed equally, sir. I don't believe, unless by an oc-

casional chance arrangement, that it ever would be equal in the three.

Q. Would it vary directly with the number of bales?

A. No, I don't think so. You might put two on and pick them up so nicely that you got the same load on both of them, but the load would be greater than if you picked one up at a time, because the rope is pulling at an angle—the bridle—and with three one could ride piggy-back on the others to still further complicate it.

Q. Also one other question: There has been some statement here that one method of hooking on the bales is preferable to another with respect to efficiency in handling and in unloading. Would it make any difference if the hooks were placed facing each other on the outward or outer bands of the bale? Would there be a lesser pull on the band if they were that way than if they were centered?

A. No, sir; it is greater if they are hooked to the outer bands because the angle of the bridle is partly pulling inward, pulling the two bands together, which is not effective in lifting them. That is added to the lift upward, whereas if the two middle bands are employed the bridle is more nearly vertical and the effective pull is against gravity.

* * *

(719) By Mr. Marshall:

Q. That last answer—did I understand you to say there would be less strain on the bands if the center bands were used rather than the outside bands?

A. Yes.

Q. So that as between inside and outside bands it would be preferable from a safety factor point of view to use the two center bands?

A. Yes.

Q. And whichever way the hooks were faced would mean nothing if the hooks held that band and the band was properly seated?

A. That is right. It doesn't make any difference, as I see it, whether the hooks point toward each other, away from each other, or one one way and one the other.

Mr. Marshall: Thank you very much.

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(723) (Side bar conference reported as follows:)

Mr. Byrne: If the Court please, I have here as Exhibit D-5 contract between Ellerman & Bucknall Steamship Company, Ltd., and the Atlantic & Gulf Stevedores, Inc. I (724) think, sir, that it is admissible as against all parties, because it delineates the duties as between the two parties. Ordinarily, of course, two parties may not contract to change the rights of a third party, but if, for example the only rights—in other words, let us put it this way: This man would be a trespasser on the Ellerman ship unless he was there on some right, and this contract is admissible in my case as part of my defense, as well as a part of my offense against the third-party defendant.

Mr. Borowsky: If the Court please, this matter has been ruled upon by the Supreme Court of the United States and by this Circuit.

• • •

Mr. Borowsky: Let me get my brief to make sure my citations are correct; but if I am not mistaken, Sieracki is one. Read v. United States is another in this Court, which Your Honor, I think, ruled on in the lower court, which was affirmed on appeal; Brabazon v. Belships, by the Third Circuit.

The Court: What good can it do you? How could it in any wise bind the plaintiff here unless he was a trespasser, and you are not asserting that he was.

(725) Mr. Byrne: Oh, I am not asserting that he was; I am asserting that he was on there under a contract,

and not only do his employers have certain duties toward him, but the individuals do.

• • •

(726) Mr. Borowsky: Your Honor, the mere fact that we have allowed this man to come aboard to handle cargo makes him an invitee by implication. He doesn't have to have an express contract. Moreover, I have cited three authorities, and I will cite to Your Honor more authorities.

I should like Mr. Byrne to cite a single authority that supports his position.

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(727) Mr. Byrne: I will state right now that I don't intend to argue in this case that Beard was contributorily negligent.

The Court: I don't know whether he is bound by any duty of care that the stevedoring company would owe to you by virtue of the contract. There is no privity here. I don't see how he could be bound by the contractual arrangement that you had.

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(728) Mr. Byrne: I like to firm the issues and get them at least clear-cut. As I understand it, Mr. Borowsky has objected to the introduction of the contract as part of my defense to the plaintiff's case upon the theory—well, he is just not privity to it.

Mr. Borowsky: Upon the theory, No. 1, that my client is not privity to it; No. 2, the Court in at least two or three appellate cases in this circuit and in the United States Supreme Court, has stated that the rights and obligations of the ship are not changed in any way by virtue of any contract that the shipping company may have with the stevedoring company. So for those two grounds, two reasons, I state my position as far as objecting to its use against my client.

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(730) Mr. Byrne: Judge Ganey, I offer in evidence D-1, D-2, D-3, D-4 and D-5. I want to make very sure that I have included within them two exhibits which were identified during the Quinn deposition, namely the sketch and a plan called a ship's cargo or stowage plan.

(731) Mr. Borowsky: D-2 is a photograph is it not?

Mr. Byrne: D-2 is this photograph.

Mr. Borowsky: Is that the one with the bales?

Mr. Byrne: Yes.

Mr. Borowsky: I object to that, Your Honor, on the ground that this is entirely irrelevant. It shows the use of a sling in connection with a multitude of small bales that have nothing to do with burlap, nor do they resemble it in size. It was objected to at the time of the taking of the deposition and I renew it now.

Mr. Byrne: If the Court please, that photograph was identified by Quinn as illustrative of the method which he said was the safe and proper method, in criticising the method adopted by Atlantic & Gulf in this particular case. He said that was a way that could have been used that illustrates a method of discharging bales of a commodity in the Port of Philadelphia.

• • •

Mr. Borowsky: Well, it is irrelevant. It may (732) be perfectly all right to put cigar boxes in a sling, but when you are talking about a thousand pound bale of such dimensions that you can't possibly maneuver it around to get it in a sling, then I think they owe us an explanation as to why they haven't showed us a picture with a sling carrying bales of gunnies. All they are showing here is a lot of bales of what looks like straw packed together, eight or nine of them in a sling, and that is just as irrelevant——

The Court: I want to check with the record, but if it is within the meaning of Mr. Byrne's interpretation of what Quinn said, why I think that is what he said. That is what he said.

Mr. Borowsky: He said that and we objected to it at the time the deposition was taken as being improper. That is by a method of photograph trying to get in evidence that which doesn't have anything at all to do with this case.

The Court: I will have to look at it in the context of the deposition.

• • •

(739) Mr. Byrne: I therefore offer in evidence the photograph in question which has now escaped me.

(Exhibits 6 and 7 marked respectively.)

The Court: I am going to sustain the objection. I think from looking at the photograph and listening to the testimony in the record this does not look to me like burlap. It is not baled the way gunnies are baled here. There seems to me to be, and also from the record, just a band lengthwise and crosswise.

Mr. Byrne: If the Court please, that is illustrative of the principle of the way that this ship's officer said this operation should have been done. I think it is clearly for the jury. I quite agree that they are bales of some other commodity. I happen to know what it is, but I say there is no difference in the principle involved, and I think it should be admitted to guide the jury.

• • •

(742) Mr. Byrne: Yes, but, sir, the binding of the bale—I am not offering the photograph in evidence for anything having to do with the binding which holds the bale in place; I am offering it to show the method whereby a sling—and this is what is known as a sling—

a rope comes down and is joined above the load; goes around under it and hooks on above it, so that the weight of the load binds—if I had a piece of string I could illustrate it.

The Court: I understand what you mean.

Mr. Byrne: —the weight of the load.

The Court: Of itself.

Mr. Byrne: Of itself. Holds it tight almost as if you had a running—actually, what it amounts to is similar to a running knot or a running bowline knot.

The Court: I don't know; I think the type of material lifted has an awful lot to do here. I think the way they are bound has a good deal to do with it.

Mr. Byrne: If the Court please, you are foreclosing us from disagreeing with the plaintiff. In other words, our evidence from this mate Quinn—and that, by the way, is offered by Mr. Borowsky—is that the method of using hooks was not proper, and was dangerous, and that he requested (743) another method be used, and the stevedore refused to do it.

Now, as I see it, you are making me adopt a method which we criticise. You are not giving the defense a fair chance to introduce its theory of the case.

Mr. Borowsky: I wish Mr. Byrne would have told us what his theory is, but if Your Honor please, certainly he can't get this into my case—not at this late stage of the game.

It is true that I offered part of Quinn's testimony, but nothing that had anything to do with these photographs.

The Court: In other words, you don't think there is any difference between lifting a matter which is pressed very closely, that is, bound by four bands and material, whatever this is, which has no binding around it at all.

Mr. Byrne: That has binding, sir; you just can't see it.

The Court: I don't know whether it has or not, if it is not in the record. How is it bound?

Mr. Byrne: It is bound by wires. Bound by wires.

The Court: Then is it your contention that these should have been loaded, when put on, with wires around them instead of bands?

(744) Mr. Byrne: No, sir; it is my contention that instead of hooks under these straps——

Mr. Marshall: If Your Honor please——

The Court Just a minute.

Mr. Byrne: The safe way, the proper way, the way that Atlantic and Gulf should have fulfilled its contract with us, was to have put bales, one or more as they chose, inside a sling, as that is called.

Mr. Borowsky: That is testifying, Your Honor, contrary to any evidence in this case. I ask Your Honor to instruct the jury to disregard it.

Mr. Marshall: I am going to ask for the withdrawal of a juror at this moment, because I understand that what Mr. Byrne has said was said loudly enough for Your Honor to hear it and obviously for the jury to hear it, and he has in fact offered certain factual evidence which has not been offered in his case. I think we have been prejudiced by it and I now move for the withdrawal of a juror.

The Court: Motion denied.

Mr. Byrne: Shall we discuss this at side bar or in chambers?

The Court: No, it has been discussed now, I don't think it is in any wise prejudicial.

Mr. Byrne: Sir, I say the purpose of Quinn's (745) testimony is that he went to the stevedore in charge of this operation and suggested that it be done in a different way.

Mr. Borowsky: If the Court please, if this is a side bar conference—will you please lower your voice.

The Court: There is nothing here. This is in the record. Take your exception.

Mr. Byrne: And this is illustrative of Quinn's testimony. That is the way he said that.

The Court: At present I will have to read it, and I will read it and rule on P-5.* My present thought is not to let it in, but I will rule on it.

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(753) EVIDENCE ON BEHALF OF ATLANTIC & GULF STEVEDORES, INC.

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FRED NELSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Marshall:

Q. Mr. Nelson, would you tell us where you live, and keep your voice up, please.

A. I live at 117 Durfor Street.

• • •

Q. By whom are you employed?

A. Atlantic and Gulf Stevedores.

• • •

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* P-5 represents exhibit D-2 previously mentioned on page 87 of the typewritten transcript.

(754) Q. All right, when the "City of Calcutta" came into port tell us what if anything you had to do as far as commencing the unloading operations and the unloading of that vessel.

A. Well, first thing I do, from our office we get a plan. That instructs us what commodities is in each hatch. That is a plan.

* * *

(755) Q. Limiting ourselves to that particular instant of the "Calcutta," did you have such a cargo plan when you went aboard that vessel?

A. I did.

Q. All right, tell us what you did with the cargo plan and who you reported to on the vessel.

A. Well, first I went aboard to see the chief mate.

Q. Do you recall his name?

A. I think his name was Mr. Quinn.

Q. All right.

A. And I told him—he asked me which hatches we were going to work, so I told him we were going to work 1, 3, 4 and 5. I believe. I believe there was five gangs on that ship.

Q. And did you determine what hatches you were going to work from the cargo plan itself?

A. That is right.

Q. Does your cargo plan reveal what type of cargo is to be unloaded at the Philadelphia Port?

A. That is right; it does.

Q. All right, after you told him that what happened?

A. Well, then we uncovered the hatch and we started to work.

(756) Q. And can you tell us how many crews you had assigned, if you recall?

A. I believe it was five, five gangs. I am not sure now. I believe it was five gangs.

Q. Pardon?

A. I believe it was five gangs we had working.

Q. All right.

A. No. 1 hatch was working gunnies. That is what we call burlap.

Q. Yes.

A. I think one hatch was discharging jute, and one hatch was discharging wool, and one was discharging skins.

Q. Skins?

A. Yes.

Q. All right; what if any conversation did you have or what if any conversation did Mr. Quinn have with you concerning the method by which the bales of burlap were to be unloaded?

A. None at all.

Q. Can you tell us whether at any time Mr. Quinn either suggested using another method or criticized the method that was being used or suggested a different one?

A. No, he did not.

• • •

(757) Q. Now, how many years experience have you had in the stevedoring or waterfront business?

A. Well, I went on the riverfront right after I left school.

Q. And how long ago was that?

A. I left school before I finished—I would say eighteen years old, I left.

Q. You are fifty now?

A. I am fifty now, and I have been supervising for over nineteen.

Q. Over nineteen years?

A. Over nineteen.

Q. And would it be fair to say you have been on the waterfront (758) in one or another capacity for about the last thirty years?

A. That is right. That is right.

Q. During those thirty years, Mr. Nelson, have you had occasion to help unload ships that had cargo of bales of burlap?

A. Yes, sir; I did.

• • •

Q. Now, you answer only the question, and my question is this: In addition to the ships that you actually helped work on in unloading this type of cargo, have you seen other companies or other crews unload bales of burlap——

A. Yes.

Q. —over the last thirty years?

A. Yes, I seen them unload.

Q. Now, can you tell us, Mr. Nelson, what method you have seen used throughout that entire period?

A. Just the burlap hooks.

(759) Q. Can you tell us whether or not you have ever seen anyone use or attempt to use slings to unload bales of burlap?

A. Not unless one bale is broken in the ship. Sometimes you find a bale in the ship that is broke, then we will put it in a sling.

Q. By that you mean were all four bands broke?

A. Yes, where it is completely broke.

Q. Now, as a matter of fact can you tell us whether these bales are one solid roll of burlap or whether or not they are actually folds of burlap in the bale?

A. They are just like a roll of goods; they come packed like rolls—maybe 30 to 40——

Q. Yes.

A. Forty packs just like a small bale of wool.

Q. You mean like a bolt of cloth?

A. Yes; that is right.

Q. In other words about 30 bolts of burlap are compressed together to form a bale?

A. Yes, they are all in bundles.

Q. Right. And around the whole thing you have a big burlap cover?

A. That is right.

Q. And around that cover you have four bands holding it compressed?

(760) A. That is right.

Q. Now, is that the way all the burlap has come that you have seen in the last thirty years?

A. That is the only way I have ever seen them.

Q. Have you ever seen bales of burlap come equipped with any kind of slings aside from the four bands?

A. No, I did not.

• • •

(766) Q. Now, I am looking for the names of these ships. Can you tell us whether or not bales of burlap come in more than one size?

A. Oh, yes.

• • •

(767) Q. I show you P-6 which has been marked in evidence and ask you if you can tell us from your own experience about how heavy those bales are?

A. These three look like a thousand pounds.

Q. Can you tell us why if any other size bale you are familiar with?

A. Then we have a double.

Q. A double what?

A. A double bale of burlap. It is longer than this, about the same in width, but is almost twice the size of these.

Q. All right.

A. I think it weighs around 1700 pounds.

Q. And you are familiar with that size also?

A. Oh, yes.

• • •

(768) By Mr. Marshall:

Q. Now, while the jury is looking at that, can you tell us what method is used for unloading these double bales weighing approximately 1700 pounds?

A. We use the same hooks.

Q. And how many hooks per bale?

A. Two hooks on each one, and we only take two.

(769) Q. What do you put the hooks into to lift out those 1700-pound bales?

A. In the bands.

Q. With your experience can you tell us whether or not that method has been found to be a successful method of unloading 1700-pound bales?

Mr. Byrne: I must object. Mr. Marshall has been leading the witness constantly. I think he should ask some questions rather than testify. I do object to the form of that question.

Mr. Marshall: I will withdraw the question and ask it this way.

By Mr. Marshall:

Q. When you use the two hooks into the two bands of the double bales weighing approximately 1700 pounds, what if any difficulty have you run into?

A. None at all.

CROSS-EXAMINATION.

By Mr. Borowsky:

Q. Is there any way, Mr. Nelson, that you can use these hooks without putting them underneath the bands?

A. No, you can't.

Q. So that the bands are a necessary part of the use of the hooks?

(770) A. That is right.

Q. You cannot use one without the other?

A. That is right.

Q. And during the time that this discharge is going on, whether it be on the "City of Calcutta" on July 1, 1955, or on any previous occasion when a City ship has been in port, have the officers been around from time to time on the deck

noticing the manner in which this was going out of the hold?

A. They are always around.

* * * *

(771) Q. Well, may I put it this way, since you are on cross-examination? Was Norton-Lilly the shipping agent for the "City of Calcutta"?

A. That is right.

Q. They represent the ship's business in the Port of Philadelphia?

A. That is right.

Q. And they are the ones that sent you this cargo stowage plan?

A. They sent it to our office.

Q. When you get that cargo stowage plan it tells you where aboard the vessel the various cargo is, on what deck and in what part of the deck; is that right?

A. That's right.

Q. And with that cargo stowage plan in your possession you then determine how many gangs you are going to have, where you are going to start in so that you get the cargo out in proper order; is that correct?

A. That is right.

Q. You wouldn't take out New York cargo if you are to unload Philadelphia cargo, would you?

A. That is right; I wouldn't.

* * *

(772) By Mr. Byrne:

Q. Mr. Nelson, along the line of your last question and answer, you frequently take out cargo that is intended to go to another port in order to, shall I say, facilitate the taking out of cargo that is to come out at Philadelphia, do you not, and then you restow it?

A. Well, as a rule when the ships come into Philadelphia there is no other cargo on there but Philadelphia

cargo; she has already been in the—otherwise the ship would be overstowed.

• • •

(775) Q. Now, these gunnies, if one should possibly happen to fall on a flat surface, it would stay put pretty much, almost like dropping a handful of pie dough, wouldn't it?

A. Well, not necessarily, it wouldn't.

Q. Well, wouldn't it be more likely that it would do that than roll if dropped on a flat surface?

A. Well, if it falls flat it will drop flat.

Q. That is your experience?

(776) A. Yes.

• • •

Q. And in this case the orlop deck of the "City of Calcutta" on this day—you may look at the cargo plan—there was considerably less cargo for another port—I believe it is New York—than there was cargo for Philadelphia, wasn't there?

A. It looks like New York had the biggest end of the hatch.

Q. Biggest end of the hatch?

A. That is right.

Q. Are there more bales for New York than there are for Philadelphia?

A. No, there is not, but No. 1 tapers off like that. See, it tapers off.

Q. Are there more bales for New York than there are for Philadelphia?

(777) A. No, there isn't.

Q. How many are there for New York according to the plan?

A. Well, there is 63 ton of gunnies.

Q. And that is in this Orlop Deck No. 1?

A. In the forward end, yes.

Q. How many tons are there for Philadelphia?

A. One hundred ton.

• • •

(780) The Court: When Mr. Byrne asked you about the working cargo you told him it was centered over that.

The Witness: That is right.

The Court: I think you ought to give us a definite answer one way or the other.

The Witness: Your Honor, if I am working the after end I got it right over the after end; if I am working the forward end I got it over the forward end. I set the boom the way the cargo is.

The Court: You do not always have it over the center of the hatch; it depends upon your working area?

The Witness: Where the cargo is. If I am working the after end I got it over the after end.

The Court: All right.

The Witness: That is what I am trying to explain.

* * *

(784) Q. Did you have any conversation with Quinn at any time about dropping any of this cargo on that day?

A. No, I did not.

Q. Now, are you sure of that?

A. Positive.

Q. How can you be sure?

A. Because—well, I know if I was dropping any cargo or anything, there is not only Mr. Quinn, on every English boat there is about—there is first mate, second mate, third mate, and they got about four junior officers. You don't drop nothing on City boats, and if they tell you about it and you don't do something about it, you don't have steam no more.

* * *

(785) Q. Now, do you know whether in fact any bales were dropped during the unloading of the "City of Calcutta" other than the one that was involved in this accident?

A. No, I do not.

Q. You don't know whether any were or were not?

A. No, sir.

Q. Is that because you cannot remember something——

A. No.

Q. —so far back?

A. No; I don't remember dropping anything on it.

Q. You don't remember any. Do you remember whether any of the bales that were discharged had broken bands on them?

A. No, I do not.

Q. No, you do not. Do you remember whether on that day unloading that ship any of the bales cargo had the bands (786) break while it was being unloaded, aside from this one that is involved in Mr. Beard's accident?

A. No, I do not.

• • •

(793) Q. You also said on Monday, when I asked you about the bale falling and rolling, whether it wouldn't have a tendency to stay in one spot like a ball of dough, let us say—you said that they sometimes landed on their corners and they sometimes will roll as this one did; is that right?

A. They fall; sometimes they bounce. I have seen bales——

Q. Yes.

A. —that carried away.

Q. And roll the way this one did?

A. And they bounce.

Q. Have you seen any that rolled, let us say, 25 feet after they fell?

A. No, I have not.

Q. But you have seen them fall and bounce?

A. That, yes, I have seen.

Q. You say "and bounce": How far did they move from the place where they came down?

A. Maybe five or six feet.

Q. Five or six feet?

(794) A. Yes.

Q. In other words, this was a very unusual occurrence to have a bale fall and roll 25 feet or so?

A. I would say it would be unusual.

Q. However, you have seen these bales fall before; is that right?

A. I have seen one of them—one or two of them fall, yes.

Q. Well, I thought you said that you had seen them fall or that you had seen them bounce on occasion.

A. I said, I seen them bounce.

Q. In all your years on the waterfront you have only seen two bales of burlap that fell while they were being hoisted?

A. That is right.

* * *

(795) Q. In other words, your testimony is, Mr. Nelson, that you have never in your experience on the waterfront seen one of the metal bands around a bale of burlap broken during the unloading operation?

A. That is right.

Q. You are pretty sure of that?

A. Yes.

Q. All right. Well now, the bales that you saw fall, how did they fall?

A. Well, the way I seen them fall is when we pick them up and the landing fall grabs them a little too fast and they get jammed underneath the coaming or something like that. That is how they fell.

Q. That doesn't tell me how they fell. What gave way that they fell?

A. Well, they got jammed underneath the coaming when they pulled them out, see, when they came up out of the hatch, see. They come up on the midship fall and the landing fall pulled them over a little too fast and they get caught underneath the coaming. Well, that will break a band.

Q. Oh.

A. That is the only way.

Q. So you have seen bands broken, then, during the unloading (796) operations.

A. I says, I seen two; but I don't work burlap every day.

Q. I understand.

A. I mean I may get one——

Q. Now your testimony is now that the only times that you have ever seen any bands, metal bands around bales of burlap, broken during the unloading operation was on two occasions, and on both those occasions it was when the draft caught on something while it was being hoisted?

A. That is right.

Q. You never saw one break before?

A. No, sir.

Q. And certainly not on the "City of Calcutta"?

A. That is right.

Q. Now, you referred on Monday to double bales that you said weighed 1700 pounds?

A. I think they were around 1700.

Q. You said that you discharged those with this same type hook?

A. Same.

Q. Put under the same metal band?

A. Same method.

Q. Now, is the band on the double bale the same size as this one? You can come down and take a look at it if you like?

(797) A. No, I am pretty familiar with the bands I see on them. I would say they are practically the same.

Q. Well, practically—do you mean they are a little bit different, or do you think——

A. No, I would not say they are different. I wouldn't say they are different. They look like the same bands.

Q. They look like the same size and same type of band?

A. Yes.

Q. Now, did you ever give your men any instructions with regard to the proper and improper way of hoisting out these bales of burlap, whether they be the 1700-pound ones or small ones?

A. Well, the 1700-pound bales we take two at a time, and we use the same method and the hooks the same way.

Q. Yes.

A. And I instruct the hatch—every gang has a hatch foreman, and I tell the hatch foreman——

The Court: Keep your voice up.

The Witness: Tell the hatch foreman just the way to hook them up.

By Mr. Byrne:

Q. Now, are you speaking of all bales or just the double bales?

A. No, I am talking about all the burlap now, because all (798) burlap comes out the same method.

Q. Oh, you say you have instructed all your hatch foremen in the proper way of using this equipment to discharge bales of burlap?

A. Burlap; yes, sir.

Q. Does that include Mr. Perry Lee?

A. Perry Lee, too.

• • •

Q. What instructions did you give Mr. Lee?

A. I gave Mr. Lee instructions to make sure the hooks are in proper, keep them in the center for an even lift, and (799) when we get the doubles, two at a time; the other ones three at a time.

Q. I see. Now, was there some reason why you lifted only two of the double bales at a time and lifted three of the single bales at a time?

A. No, the reason I take two of the double bales is, in the gangway, when they land in the gangway, see, they land them on blocks when they come out, then the chisel comes and picks them up and brings them to the dock where we can

pile them three high. Now, you get three of them double bales in the gangway, there is not too much room in the gangway.

• • •

(814) By Mr. Borowsky:

Q. The No. 1 hold is the one closest to the bow end of the vessel, is it not?

A. That is the first hatch forward.

Q. And the sides of that vessel curve into toward a point as they approach the bow of the vessel, do they not?

A. That is right.

Q. So that in the front part of the hatch the space between one side of the ship and the other side is narrower than it is toward the after end of that same hatch, is it not?

A. That is right. That is right.

Q. And if you were to put 63 tons of cargo in the front end of that hatch it would stick out more toward the after end, would it not, than if you had put the same amount of cargo (815) in the after end?

A. That is right; it would take more room.

• • •

(823) Q. I have one other question I should have asked you earlier, perhaps. You said that some of this cargo, namely the bales of wool, were not discharged with hooks; that they were discharged with rope or wire rope slings.

A. Not wire rope; slings—rope slings.

• • •

(827) By Mr. Marshall:

Q. As a matter of fact, Mr. Nelson, I think yesterday you explained to us that those bales of wool do not have a band.

Mr. Byrne: I object to the question.

The Witness: That is right, but that is why I take them out with slings.

• • •

(828) Q. Mr. Nelson, I will ask you, first of all, to look at this band, and having looked at it I will ask you to tell the jury how it compares with the band, if any, that appears on those wool bales.

A. The bands on the bales of wool, there is no comparison of them bales. It is one of narrow gauge and it just keeps winding around.

Q. In other words——

A. You couldn't use hooks on them, because if you put a hook in them, and if accidently one of them did break the wire, the bale would just keep on raveling right out of it, whereas these are put on four individuals.

Mr. Byrne: Where these are what?

The Witness: These bands are different.

By Mr. Marshall:

Q. Then would you kindly make it clear to me and the jury how many bands there are on a wool bale, and how many bands there are on a burlap bale?

(829) A. Well, on a burlap bag—on the burlap I believe it is six.

Q. You mean on the double bale?

A. On the double bale, and four, I believe, on the small ones.

Q. On the 4-banded bale how many bands are used to unload the bale of burlap?

A. Two. Two on each one.

Q. Now, would you tell us how many bands there are on a bale of wool?

A. Well, it is one band. I can't tell you—it is one band all wrapped all around it.—

Q. That is right.

A. It goes zigzag all the way out to the end.

Q. What would happen if the one band on the bale of wool broke?

A. If you took a hook and you lifted it out and it carried away the band would just unwrap; you would pull the whole band off right in one piece.

• • •

By Mr. Borowsky:

Q. Just two questions that I have: Is a bale of wool covered with a solid covering like a bale of burlap?

A. It is, yes.

• • •

(831) Q. It is burlap?

A. Yes, it has got burlap on it.

Q. Does it make any difference if you get your hook into the wool? Will it damage the wool?

A. On wool, no. On wool you can use a hook.

• • •

(832) Q. And by putting the hook into that wool it doesn't damage the cargo, does it?

A. It doesn't damage the wool, no.

Q. And because of the size of those woolen bales one man or two men can put their hooks in it and turn it over, can they not?

A. That is right.

• • •

(835) WILLIAM WHEELER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Marshall:

Q. Captain Wheeler, would you tell us what your address is, (836) please?

A. I live at 364 Washington Avenue in Pelham, New York.

Q. All right, sir, how old are you?

A. Forty-one.

Q. Would you tell us what your occupation is today?

A. At present I am employed by the Walter J. Byrne, Incorporated, which is a firm of marine consultants and industrial consultants, of New York City.

Q. As a matter of fact, can you tell us whether or not you are familiar with the Mr. Keeler who was on the stand, as opposed to your name being Wheeler?

A. Yes, sir; I am.

Q. Is he or is he not connected with one or more of the same associations with which you are connected?

A. We do have associations with Paul J. Keeler Associates, yes.

Q. All right, would you please tell us, Captain Wheeler, what experience you have had at sea on ships, and when that experience began.

A. Well, upon graduation from high school I went to sea as an ordinary seaman in 1935.

Q. And with what ship or with what company?

A. At that time it was the Isthmian Steamship Lines, and we were engaged in the Far East trade.

(837) Q. Far East trade?

A. Yes, India.

Q. What kind of operation or cargo was involved in that seagoing experience with the Isthmian Line?

A. This was the India trade, which was the usual India cargoes consisting of manganese ore, jute, gunnies, which is the same almost; raw jute, manufactured jute into gunny cloth; rubber, skins, tea.

• • •

(849) Q. Captain, in your particular profession can you tell us whether or not you are personally affiliated with any maritime, stevedoring, naval or other organizations or associations?

A. Yes, I am a commissioned officer in the United States Naval Reserve. I am an alumnus of the United States Merchant Marine Academy, and the National Geographic Society and many others.

Q. All right; and what if any certificates or licenses in all do you hold or have you held?

A. At present in force I hold a master's license, gyro certificate, fire-fighting certificate, radar certificate, loran certificate, and I think there is a few more in the number.

• • •

(850) Q. Mr. Wheeler, first of all, let me ask you to observe for the record what has been marked as Plaintiff's Exhibit No. 1, and I ask you to tell us what you know that to be.

A. That is a set of burlap lifting hooks, or known as bale hooks.

Q. And you have seen those extended, haven't you?

A. Yes, I have.

Q. Can you tell us where you have seen similar types of hook and rope arrangements?

A. I have seen them used up and down the Atlantic Coast for the last twenty-three years off and on.

Q. As a matter of fact, can you tell us whether or not this particular type of set has been an improvement over (851) prior types of sets?

A. Yes, there has been several minor improvements in his particular type of lifting gear.

Q. Now, how long has this particular type or this improved type been in use so far as you know?

A. For the last three years. The last improvement that I can see on this particular set of gear was done in the last three years.

Q. All right, as a matter of fact are you familiar with the man under whose general supervision this improved type of hook device was conceived?

A. Yes.

Q. And who is that man?

A. Paul J. Keeler.

Q. Is that the same Paul J. Keeler who was a witness in this case?

A. That is right.

Q. Now, tell us, Captain Wheeler, what if any other methods you have seen used to unload bales of gunnies or bales of burlap, if any, other than by the use of this type of rope and hook device.

A. I have never seen any other method used for removing that type of cargo.

Q. And can you tell us whether that answer includes your (852) observations of unloading bales of cargo in ports other than Philadelphia?

A. Oh, yes.

Q. What are some of the other ports?

A. Boston, New York, Baltimore, Newport News, Norfolk.

Q. All right, it has been testified, as you have heard, that the method that was being used on July 1, 1955, consisted of placing two hooks under two separate bands on each bale and raising three bales at a time. Can you tell us, sir, whether or not that coincides with the method which you have seen and observed in use throughout these various ports unloading this particular kind of cargo?

A. That is right. That coincides.

Q. The bales in question were approximately 1,090 pounds. Are you familiar with any other size bale besides the one shown on, let us say, P-5, I believe it is?

A. Yes, there are other type, other size bales, both smaller and larger than this particular size.

Q. All right, how large would you say the larger size is?

A. The largest individual bale I have ever seen is 1700 pounds.

Q. How many bands were on the 1700-pound bale?

A. There were six bands.

Q. And on the one you are looking at, it has how many?

(853) A. Four bands.

Q. Now, have you seen the 1700-pound bales being unloaded?

A. Yes, I have.

Q. What method is used to unload those 1700-pound bales?

A. Identically the same gear.

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(855) Q. As a matter of fact you heard Mr. Keeler testify last week that the safest or the least strain on the band was experienced when the hook was inserted at the corner of the bale.

Did you so hear him testify?

A. I heard him so testify.

Q. At my request where did you go directly after court that day?

A. We left the court here and went down to Pier 98.

Q. And what did we find down at Pier 98?

A. The "City of Agra" had just completed discharging bales of gunnies.

Q. Can you tell us what size bales of gunnies you observed that afternoon, which I think was last Thursday afternoon?

A. Last Thursday. Both the thousand-pound bales and the 1700-pound bales were on the pier.

(856) Q. All right, and while you were there what did you do during the time you were examining the bales and the bands and those hooks?

A. Well, to confirm my own opinion I got a set of lifting gear here, of bale hooks, and actually tried to insert the hook in the corner of the bale.

Q. And what happened?

A. And found that it was physically impossible for me to insert that hook at the corner of the bale or closer, any closer than 10 inches to the corner of the bale.

• • •

(857) Q. Can you tell us whether or not you as well as others in your presence including myself made substantial efforts to try to insert hooks under the bands at the corner of the bale?

A. We did.

Q. And what if any success was had?

A. It was physically impossible to do it.

* * *

(858) Q. Now, Captain Wheeler, in your experience with bales of gunnies—and we will limit ourselves to that—have you seen bands depressed on these bales break during any part of the unloading operation?

A. Yes, I have.

Q. And tell us under what circumstances you have seen such bands break.

A. Well, there is two stages, two phases of the operation, where bands, where a stress is put on the band, and that is when it is being dragged out from the stow, and when it is being lifted. So that is the only two times, the only two conditions, that will cause a break.

Q. All right, when bales are pulled out of stow, on that occasion have you seen bands break?

A. I have.

Q. And what was the condition of the stowage with respect to tightness of the stow under those circumstances?

A. Well, in some cases—in every case the stow was very tight. In some cases the bottom of the band sliding across a steel deck would catch on an obstruction, a lap joint of the plating, or a rivet head, and that would snag the bale, and the band would break in that case.

Q. And can you tell us, sir, on lifting operations what your experience has been to cause bands to break while they (859) are being raised?

A. In the lifting operation if the draft is allowed to swing and touch another object, whether it be the other part of the stowage, a ladder in the hold, the tweendeck coaming or main deck coaming, the bale itself would come up harder under the tweendeck coaming or ladder, let us say, and it would put great stress on that particular band and it would break.

Q. In that circumstance is the condition that the bale being lifted in effect gets caught under the coaming or a stanchion or what have you?

A. That is right.

Q. Now, tell us, Captain, whether or not you have ever seen a bale fall or bands break where there has been no jerking, where there has been no swinging, and where there has been no hooking under any coaming or any other obstruction apparent to anyone? In other words, can you tell us whether you have ever seen a bale drop or bands break on a straight vertical lift unimpeded by any outside force?

A. May I clarify that with a question?

Q. Yes.

A. Assuming the bands are in good shape?

Q. Assuming, of course, that the bands are in good shape.

A. I have never seen a band break under those conditions (860) you have described; no.

Q. Can you tell us in your experience, Captain, whether you personally would regard this method of unloading this type of cargo as the usual and customary method in this type of business.

A. It is.

Q. Can you tell us, sir, whether or not you would regard this method of unloading this type of cargo as a safe method?

A. It is.

• • •

Q. Now, Captain, it has been suggested by the chief mate on this ship, through his deposition, that this type of cargo should be unloaded by the use of slings or by means of slings. Now, are you able to express an opinion as to whether or not it would be physically possible for a man to (861) discharge these bales from their stowage position into a position to be placed in slings and in fact raised by the use of slings?

A. It would be physically inefficient for four men to discharge these bales from the hold of a ship in any other manner but this one that is used today.

• • •

Q. Tell me, Captain, from your own personal observation of breaking out stowage and breaking the new tiers of bales, whether even four men would be able without the use of hooks to pull those bales out of stowage?

A. Impossible.

Q. Assuming that they were able to get by some means the bales out of tight stowage and over toward the center, would you in your experience, both from the stevedoring point of view and from your experience as a shipping man, regard this (862) type of cargo as unsafe to be physically handled or twisted or turned by four or even six men?

A. That is right.

• • •

Q. Tell me this, Captain: Let us assume that you and I were going to devise a means of using the sling type of device which you have heard described here; what would the men have to do in order to get the bales out of the cargo stowage and into a position where the bale is encompassed by one of these slings?

A. You would have to have a great amount of manpower to begin with, then each man would have to have some means of gripping this bale, which would involve the use of a hook on the bale itself.

Q. Now, just stop there; can hooks be used on this type of bale?

(863) A. No.

Q. As a matter of fact, are you familiar with what is stamped on those bales?

A. Use no hooks.

• • •

(866) Q. Let me tell you this, Captain. Since the bale is 4 feet across and since that band is stretched over that 4-foot

area, if you in your practical and background experience were going to test how much strength one of those bands had, or how much force one of those bands could be subjected to, would you consider any kind of device which permitted that band to have roughly a 4-foot span, and using the type of equipment that was used on the bale in question, would you regard that as a sound method of testing the band?

A. That is right.

Mr. Byrne: Objected to.

The Court: No, I will hear that. I think that is a different question. If he can say——

By Mr. Marshall:

Q. Captain, let us assume that exactly such a test was made—in fact a series of tests—and let us assume that as a result of those scientific tests it was demonstrated to (867) you that out of the five bands the average breaking point was in excess of 4000 pounds per band—in other words the bands withstood an average in excess of 4000 pounds before each band broke—in view of the fact that two bands and two hooks are used for each bale weighing about 1100 pounds, would you regard that method of unloading, wherein each band was subjected to approximately 600 pounds, as safe in view of the fact that over 4000 pounds were withheld on the average by the bands being tested?

A. Yes, it is safe. The safety factor there, calculating roughly as you went along—the safety factor would be about 6 or 7.

Q. Between 6 and 7 to one?

A. That is right.

Q. As a matter of fact, from your experience what is the general safety factor normally required by the engineering field?

A. Five.

Q. Five to one?

A. That is right.

Q. Would you also agree with Dr. Grosvenor's testimony, or Mr. Grosvenor's testimony, that many things, even in the laboratory, may or may not find themselves corroborated by practical experience?

(868) A. That is true.

Q. And from your practical experience and your experience over the years, I will now ask you whether or not you consider the method that we used in this operation as the safest known method for unloading this kind of cargo?

A. That is correct.

CROSS-EXAMINATION.

By Mr. Borowsky:

Q. What part does the band play as opposed to the hook in this operation?

A. The band serves as a sling with which to lift the bale.

Q. Can you discharge this cargo without putting the hooks in the band?

A. With hooks?

Q. Yes.

Mr. Byrne: I object. Is that the question, "With hooks"?

Mr. Borowsky: Yes; that is all we are talking about.

The Witness: That is the only way to lift the bale with the use of this gear, is to insert it under the band.

By Mr. Borowsky:

Q. Would you say that the band, then, is just as important (869) in this operation as the hook itself, and the weakest member of the team would be the band or the hook, if you are going to have a bale drop?

A. I have seen both fail, as I described before. A bale caught under the coaming, and in some instances the band broke, and in other instances the bill of the hook broke.

The bill of that hook is carried away and the band was intact.

Q. Would you say that the band, therefore, was intended to be used as one of the means of discharging this cargo?

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(870) By Mr. Borowsky:

Q. Do you understand the question?

A. Yes, it is intended to be used in order to insert the hook in the bale for lifting it.

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Q. As far as you could observe on those other occasions when the bales were discharged by means of hooks, was that ordinarily done—was the hook inserted under the band?

A. In every instance; yes, sir.

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(881) Q. Let me put it this way. In all your experience have you ever seen bands of a bale break when the bale is being lifted up straight from the square of the hatch after it has been settled, at a moderate rate of speed and in a straight lift, before the lift has been completed, without the bale coming in contact with any object or catching under any deck?

A. I have never seen one break under those conditions—assuming the band was intact.

Mr. Borowsky: That is all I have.

By Mr. Byrne:

Q. That is quite a large assumption, isn't it, Captain?

A. It is.

Q. Pardon me?

A. It is.

Q. Because the bands can be partially torn in pulling out of stow and break during the lift, and yet you couldn't say whether they were defective before they were pulled out of stow or not, could you?

(882) A. That is right; there could be an invisible flaw in the metal itself.

Q. And as a matter of fact the very pressure—shall I say side pressure or tearing pressure of the hook against the edge of the band could weaken it.

A. To a very slight degree it might weaken it.

Q. I see.

A. —but there is very little distortion put on that band by that particular type of hook.

* * *

(892) Q. Yes. Is it fair to say that while you have seen with your eyes a number of cargoes, a number of instances when burlap in bales was discharged from ships, you have never actually worked in the operation other than as a stevedore?

A. Other than as a supervisor, yes.

Q. Supervisor. Now, you said that you had seen these bales or the bands on bales broken. Could you express in terms of percentage, for example, the number of broken bands with respect to the number of bales? In other words, if you were discharging a thousand bales, in your experience would you see five bales that had a band that broke sometime during the operation, or ten, or twenty?

A. Sometime during the operation?

Q. Yes.

A. Not only in lifting but in all phases of the operation?

Q. Yes.

A. Oh, I would say roughly between 3 and 5 per cent of the bales.

Q. Between 3 and 5 per cent?

A. At all phases of the operation.

Q. And you said that the greater number in your experience occurred when they were being dragged out of stow?

(893) A. Absolutely.

Q. And in addition to the bands actually breaking, would you agree that damage could be done to them without actually breaking them while they were being dragged out of stow?

A. It would be of a superficial nature.

Q. Well, when you say "superficial nature" do you mean that there could be no damage which would affect the strength of the metal of the band?

A. Not unless it was actually dragged. In the process of dragging, it could be damaged in that case. If the bales stacked up it could be broken.

Q. It could, for example, catch on the buckle of the bale next to it and be partially torn before it pulled free, couldn't it?

A. That would be possible.

Q. Have you seen such?

A. I have never seen that happen, no.

Q. You have never seen a band that was partially torn by the edge of the buckle that was used——

A. I have never seen it. I heard that discussed here in court——

Q. And you have never seen it?

A. —to the best of my memory I have never seen that condition.

(894) Q. Do you agree that there is a certain shearing action in that buckle?

A. No, I don't agree with it.

Q. Pardon me?

A. I don't agree with that theory.

* * *

(904) Q. Now, you said that many of these bales that you have seen being unloaded from ships had something stenciled on (905) the side saying "Use no hooks"?

A. I have seen bales with that marking on them.

Q. Similar bales to these?

A. Similar in size.

Q. Same type of metal banding?

A. Roughly the same type, yes.

Q. And you interpreted that to mean, use no hooks except these hooks; is that right?

A. Use no hooks—that means hand hooks.

Q. How do you know?

A. That is a common warning in the shipping industry. You will see it many times on cases of fragile commodities, cartons of foodstuffs, "Use no hooks." That doesn't mean, use no hooks in your bridle; it means hand hooks.

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(906) Q. And you certainly didn't mean to convey to this jury the idea that stevedores' hooks could not have been used to roll this bale in position by inserting under the strap, did you?

A. Oh, you couldn't handle—you couldn't roll a bale like this by inserting a hand hook under the strap.

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(907) Q. You don't think it could?

A. No; not without damaging the commodity. You would have to insert the hook into the goods, into the material itself, because a hand hook on a band, on a steel band, is metal to metal. The hook would slip.

Q. Well, this is metal to metal, isn't it?

A. Yes, but a man isn't pulling on that; there is a winch pulling on it.

Q. I see; you think that makes a difference?

A. Certainly it makes a difference.

Q. What difference?

A. A man, when he puts the hook under the band, if he is trying to topple this bale standing up, he is pulling against (908) the long dimension of the bale itself. I don't think three men could stand that bale on end by pulling from this direction. They would have to get behind it and lift it.

Q. I see; but four men could do it, couldn't they?

A. No; I doubt it.

Q. How many men could do it?

A. Oh, I would say, at least, you would want about six men on that—two on each of the three sides.

Q. So what you meant when you said "physically inefficient" was really that it would cost the stevedore more to do the job that way, wasn't it?

A. I meant that the men assigned to this job would wear themselves out in the first half hour to an hour. They would be physically spent; they would be no good for the rest of the day.

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(911) WILLIAM W. KUGHNE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Marshall:

Q. Captain Kughne, what is your present occupation?

A. Commissioner of Pilotage for the State of New Jersey.

Q. What is the duty of the Commissioner of Pilotage?

A. We control the pilots.

Q. And who are pilots?

A. Pilots are men which bring ships into New York Harbor.

Q. All right, how old a man are you, sir?

A. Seventy.

(912) Q. How long have you been Commissioner of Pilotage for the State of New Jersey?

A. Since December, 1953.

Q. What has been your major background occupation?

A. I am a sailor.

Q. When did you first go to sea?

A. 1896.

Q. And in what country?

A. In the North Sea, Germany, off the German Islands.

Q. How long did you serve at sea connected in any way with the German Country?

A. Until 1905.

Q. And then did you have any sea duty with any country other than Germany?

A. Sailed on British ships and mostly on American ships.

Q. British and American?

A. British and American.

Q. How many years on American ships?

A. Since 1906.

Q. All right, can you tell us, Captain, briefly, whether in all of this experience you had had many occasions to haul or to see unloaded bales of gunnies?

A. Yes, sir.

Q. As a matter of fact, for how many years have you been a (913) sea captain?

A. About forty years.

Q. All right; how many years were you personally on the East India run or on the India run?

A. From 1910 to 1914; 1943 to 1945 to 1948 again.

Q. And in the India operation?

A. Yes, sir.

Q. Can you tell us whether bales of gunnies made up a substantial part of your usual cargo?

A. Yes, sir.

Q. Now, captain, I am only concerned with unloading of bales of cargo. Have you ever seen any method used in any one of your ships of unloading bales of gunnies other than the method which you have heard described here in court?

Mr. Byrne: I object.

The Witness: No, sir.

The Court: No, that is all right.

Mr. Byrne: Let it go; the witness has answered.

The Court: What was your answer, Captain?

The Witness: No, sir.

By Mr. Marshall:

Q. For how many years have you seen this type of hook and band method used for unloading bales of gunnies?

A. Since the middle thirties and also in the end of 1914—(914) beginning of 1914.

Q. 1914 or forty?

A. Fourteen.

Mr. Byrne: Was the early part of that answer, since the middle thirties?

The Witness: Middle thirties, yes, sir.

By Mr. Marshall:

Q. In all your experience, how many ships or hundreds of ships would you say you have seen with this type of cargo being unloaded?

A. Oh, quite a great number. I couldn't tell you the exact number.

Q. Well, would it be more than a hundred?

A. Oh, yes.

Q. Now, sir, would you please tell us whether or not you have ever seen, with the use of these hooks, using two hooks in two separate bands and raising three bales at a time, bales weighing about a thousand ninety or eleven hundred pounds, assuming that the bale or the draft was being lifted vertically, with no jerking, no hooking under the coaming, no fouling of the lines of any kind—under that set of facts have you ever seen a set of bands break and cause a bale to fall back into the hold?

A. No, sir.

(915) Mr. Byrne: Objection. Just a minute, Captain, please. I don't want to interrupt Mr. Marshall, but when I stick my hand up that means I want to address myself to the Court.

I object, sir. There is not enough fact here, because what happens prior to the time of the lifting operation commencing is, I submit, clearly important.

Mr. Marshall: I agree with that.

By Mr. Marshall:

Q. Captain, it has been testified here that the method of discharge consisted of having the stevedores in the hold these hooks to these bales as they are in stowage, and in this particular case the stowage was sufficiently low that the men could get up on the bales, and that they hooked the two hooks into the center bands of the bales, and by means of the winch equipment the bales were then drawn to the center of the hatch and steadied, and then, once they were centered and steadied, the draft was then begun in its rise to the top of the coaming. Now, first of all, have you seen that type of operation in these hundreds of ships, or this hundred ships or more that you have told us about?

A. Yes, sir.

Q. All right; assuming that set of circumstances, and assuming that the cargo or the draft was now centered, and (916) was now rising to a height of possibly 25 or 30 feet or more, without any obstruction, without any fouling of the lines, without any interference or obstruction against coaming or any part of the ship's superstructure, on straight vertical lift, have you ever seen any bands break during that stage of the unloading procedure?

Mr. Byrne: That is objected to, sir, unless there is also added that it is assumed that there has been no damage to the bands during the break-out operation.

The Court: Oh, I wouldn't assume that. You can ask him. I think that is all right. You may answer, Captain.

The Witness: No, sir.

By Mr. Marshall:

Q. In your experience, Captain, have you seen bands break either during the breaking out of the stowage or when there has been fouling or obstruction against some part of the ship's superstructure?

A. No, sir.

Q. Let me ask you this: The type of hook and the type of rope that we have in court marked as P-1—is that the type of device which you recognize as having been used in this type of unloading operation in your own experience?

A. Yes, sir.

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(918) CROSS-EXAMINATION.

By Mr. Byrne:

Q. Captain Kughne, does it make any difference how the hooks are applied, whether they point toward the center of the bale or toward the outside?

A. No.

Q. In other words, you have never seen any break under any circumstances?

A. No, sir.

Q. I see. Actually, you have never been a stevedore?

A. No, sir.

Q. As a ship's captain do you customarily or did you customarily, go down into the hold to see the detail of the (919) work that was going on down there?

A. Quite often.

Q. Out of all these hundreds of cargoes of gunnies that have been carried while you were a ship captain, on the ships of which you were a captain, how many times were you in the hold and watch the detail of the discharging operation?

A. Well, I couldn't say that, but——

Q. A great many?

A. A great number of times.

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Q. And you have never seen any of these bands break in your experience?

A. No, sir.

Q. Not even one?

A. Not even one.

(920) Q. Not even when they were being broken out of stow?

A. No, sir.

Q. Never seen a band cut by the buckle?

A. No, sir.

* * *

(922) ROBERT S. STRIMEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Marshall:

Q. Mr. Strimel, how old are you?

(923) A. Forty-three.

Q. By whom are you employed?

A. Tinius Olsen Testing Machine Company.

Q. How long have you been employed by the Tinius Olsen Testing Machine Company?

A. Eighteen years.

Q. By the way, where is your home?

A. In Penllyn, Pennsylvania.

Q. All right, will you kindly tell us, Mr. Strimel, what your educational background has been—what high school, what college, or what have you.

A. Well, a long time ago I went to Norristown High School, and then I went to Temple University where I majored in mathematics and minored in physics and chemistry.

Q. Following your graduation from Temple University—by the way, you did graduate, didn't you?

A. Yes, sir.

Q. Then what did you do?

A. Well, I was in YMCA work for a few months, and then instead of getting into schoolteaching I took a job as an assistant technician in the research laboratory of Tinius Olsen Testing Machine Company.

Q. And have you been with them up to the present time?

A. Yes, sir.

Q. What kind of work did you first begin to do when you (924) went with Tinius Olsen?

A. Well, almost immediately—in fact, I did immediately start learning about the strength of materials—not only the basic strength of steels, aluminums and things like that, but also cables and all types of regular tests which require strength properties.

Q. By the way, would you tell the jury who or what the Tinius Olsen Testing Machine Company is, or what they do?

A. Well, I am prejudiced, sir, but I think we are the leading manufacturer in the world of testing equipment for all types of strength testing.

Q. By test equipment what do you mean?

A. Well, a testing machine is a device for accurately controlling and applying a load or a pressure or a tensile test or a compression test and recording the load within accuracies which are will within 1 per cent.

Q. Now, as a matter of fact, can you tell us whether or not there are certain known standards by which this testing equipment must be made, or certain standards which must be met by such testing equipment.

A. There are various standards associations. The most prominent is the one that Professor Grosvenor mentioned, which is ASTM, the American Society for Testing Materials, which is actually our Bible as far as making equipment is (925) concerned. There are federal specifications, the Army and Navy, Lloyd's of London, American Bureau of Shipping; of course, the Air Corps, the Missile

Program, they all have specifications out today, and we must build our equipment to meet those specifications.

Q. Will you give us a brief idea who would buy or who Tinius Olsen sell their testing machines to?

A. Our machines are used—sold to and used in college laboratories and universities; they are used in manufacturing plants which manufacture, for instance, these hooks right here. They are used in the manufacturing plants which make the rope. In fact, they are even used in paper plants. In fact, we make all kinds. They are used in the Missile Program. In fact, every conceivable field where strength properties are important or material, our equipment is used.

Q. How long did your work as laboratory technician continue from when you began?

A. Let me see now. It is pretty hard to remember, because I became a head technician, and then eventually I became engineer of tests. I would say that happened about the middle or end of the war. I became engineer of tests when I was directly in charge of operating the laboratory. Does that answer that question, sir?

Q. Yes. What is your present designation with Tinius Olsen (926) Company?

A. Well, my present designation—I am director of testing research.

Q. How long have you had that job or position?

A. Since 1952.

Q. Now, can you tell us, Mr. Strimel, whether you personally have actually designed the basic design for any new type testing devices?

A. I have been very fortunate, Mr. Marshall, in that I am the holder of about twenty-one basic patents on Tinius Olsen equipment today, which are our main lines of equipment in the testing field—that is in the strength of materials, of course, field, which is a testing field.

Q. Mr. Strimel, do you recall some date on or about February 10 or thereabouts when I first brought some material to your office?

The Court: Before we get into this, are you going to ask him some questions? You are qualifying him as an expert?

Mr. Marshall: Yes, but first of all——

The Court: I think we ought to know something about what work he did in these various capacities.

Mr. Marshall: All right, very good.

By Mr. Marshall:

(927) Q. You say you have tested all types of material and equipment. First of all, would you be able to estimate, say, in round numbers, how many individual tests of strength you have made on metals or other similar devices.

A. I would say over the last eighteen years I have conducted at least eight to 10,000 actual physical tests on materials, personally, myself.

Mr. Byrne: Judge Ganey, I might state for the record that I don't question this gentleman's qualifications to make tests.

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By Mr. Marshall:

Q. Out of these eight or 10,000 physical tests of strength what would you say would be the percentage of those tests which would relate to metals such as metal bands or metal (928) straps?

Mr. Byrne: I object to that question. There are two questions in one. I have no objection to the matter of metal bands.

By Mr. Marshall:

Q. Of the eight or 10,000 tests how many tests would have related to metal or metal products?

A. I would say 80 per cent.

Q. And would you tell the jury basically how you go about testing metal, let us say, for tensile strength.

A. Well, Dr. Grosvenor—excuse me, Professor Grosvenor, gave a description, I believe, and if the jury didn't understand that description I will be very happy to give another detailed description of it.

Q. Just briefly describe, either commenting upon his description of it, or from your own understanding the nature of the testing that is done.

A. Sure. According to the ASTM specifications or the Army or Navy specs, certain machining operations must be done to prepare a standard tensile specimen for a tensile test, and in the case, for instance, of these bands here you would make a reduced section which is of parallel length, and then you would insert that specimen after you had made micrometer measurements on the width and thickness of the reduced section, (929) put it into a testing machine, pull it apart under controlled conditions which I mentioned earlier, and you would then achieve the yield strength, the tensile strength, the elongation, the reduction of area, or any other properties which were particularly required in that particular test.

Is that what you mean, sir?

Q. Yes. Can you tell us from your own point of view whether certain types of metal have properties that distinguish them from other types of metal? For instance, how would you compare, let us say, the metal that is in this band with the piano wires which Mr. Grosvenor used in his demonstration?

A. Well, they have one thing in common which is that they are steel, but——

Q. Where do they differ?

A. The music wire definitely is a high strength, low ductility material, and it is a brittle-like material, whereas this banding material is a relatively low strength material and possesses a great amount of elasticity.

Q. All right, what do you mean by ductility?

A. I mean the ability of the specimen to stretch after the yield phenomenon has been reached until the time that

ultimate tensile takes place. For instance, a material such as this strapping material does have 21 per cent elongation as measured, whereas that music wire might have only 2 or 3 or (930) 5 per cent based upon the particular grade of music wire.

Q. Are there various grades of music wire or piano wire?

A. Well, generally speaking the various manufacturers of music wire pride themselves upon being able to make better music wire than one another, so its properties might vary a little bit, but generally speaking all music wire or piano wire, as you call it, is considered high strength material which has low extensibility as far as permanent elongation is concerned.

Q. Let me ask you this, Mr. Strimel: Would it make any difference to you to know whether or not the bands which we submitted to you were what you would call virgin bands, never used before, as compared with bands that had been cut off bales of burlap? Would it make any difference?

A. It sure would make a big difference with respect to its properties.

Q. Tell the jury in what respect it would make a difference.

A. It would definitely have a lower yield value than the yield Dr. Grosvenor testified to yesterday.

The Court: I think we are getting to the point where if anyone wants to examine as to qualifications, they should.

Mr. Borowsky: I just want to ask one question.

The Court: All right.

(931) By Mr. Borowsky:

Q. Is it part of your business, if I have a problem in industry and I want something tested—can I go to you and say, "Here is my problem. I am going to use this ma-

terial to wrap a piano and I am going to hoist it from the ground floor to the seventeenth floor of the Packard Building, or the Bellevue-Stratford"; do you then—is it part of your business then to examine the use that I am going to put that to and make your test according to the use that I am concerned with, or are you solely a laboratory tester who uses machines to test things without regard to the context in which they are going to be used?

A. I perhaps should have talked a little bit more in my opening answers to Mr. Marshall. We at Tinius Olsen have a relatively small commercial volume of business and a large research laboratory. They are combined under my jurisdiction. Generally speaking, we do not—in fact, we do not advertise for commercial business. Anyone that comes along that has some strength problem, and if we have the time, we will try to help them in developing methods, especially developing methods and ways of making tests to satisfy their particular problem. In other words, we have devised many kinds of gadgets or fixtures or test tools which now are standard accessories with our equipment, because we are primarily (932) concerned with building and selling testing machines to all these various industries, and, of course, my job is to try to develop new gadgets, new equipment, to incorporate in our machines, so as a result we do help people that come to us, but we never go out and solicit this type of work that I am doing here today.

Q. But if I come to you with a specific problem in the daily conduct of my business, or a particular problem that I am going to encounter in my business, do you make your test in the light of what I am going to do, in my particular problem, or how I am going to use the particular material?

A. If we feel that your problem comes within the realm of our equipment that we have available we would be very happy to help you or anybody else that would come along.

Mr. Borowsky: Very good; that is all.

By Mr. Marshall:

Q. Now, is it in that very vein that I approached you for the first time and confronted with the problem of how we could test certain bands?

A. That is true.

The Court: Just a minute; do you want to examine him, Mr. Byrne?

Mr. Byrne: No. Maybe just one question.

By Mr. Byrne:

(933) Q. Are you a graduate engineer, Mr. Strimel? I notice you mentioned math.

A. I am not, Mr. Byrne, a graduate engineer, but I have served in the strength of materials field for my sole livelihood for the last seventeen years. I am an active member of the American Society for Testing Materials, the ASTM, and the American Standards Association—the three leading associations which set standards in this country today.

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(935) Q. Mr. Strimel, we recessed yesterday as I was completing your background and your qualifications, and now I would like to ask you whether or not at some time, I believe it was early in February, you were approached by me with a problem how best to test bands of the kind you have seen in this courtroom; is that correct?

A. That is correct, sir.

Q. As a result of those conferences which you and I held, can you tell us whether or not you devised a simulated method of testing these bands that would simulate their position on the bale during the process of lifting?

A. We did make such a device, after discussing the problem with you. You brought some pictures along of how these bales are lifted out of the hold of the ship, or whatever you call it.

Q. Yes; those photographs are the ones?

A. These photographs are the ones which you brought.

Q. Which are in evidence.

A. And after having a discussion about the thing, about the approximate sizes, and things like that, I cooked up the idea of making a simulated bale as near the bale and (936) test rig as possible.

(Exhibit 3D-3 marked.)

By Mr. Marshall:

Q. I have shown this to counsel. I show you what has been marked 3D-3 and ask you whether that is your diagram of a simulated testing device based on the problem which was submitted to you?

A. That is a sketch of a simulated test device for testing the straps.

Mr. Marshall: If Your Honor please, I will pass that to the jury while I make a statement to the Court.

As a result of a conference between myself and counsel at the end of yesterday's session, we would like to stipulate on the record that the bands which we will refer to during this morning's session and the bands which have been marked as P-7, if a Mr. Woodhouse from the Chase Burlap Bag Company on Delaware Avenue were called in court to testify, he would testify that these bands, all of them, were cut off bales of burlap weighing approximately 1,090 pounds which were India bales of gunnies; so the bands we are going to refer to are similar in nature to P-7, and these are all similar in nature to the ones involved in this case.

First, I would like to have these marked in order.

(Exhibits 3D-4, 3D-5, 3D-6, 3D-7, and 3D-8.)

* * *

(947) Q. Now, Mr. Strimel, once you had a mechanism established in your machine, would you describe briefly how your machine would function in order, first of all, to apply pressure, and secondly, to measure that pressure. Perhaps you can do it by using 3D-8 which has a portion of the dial to the right, and 3D-9.

A. If you recall the photograph we showed before this one——

Mr. Byrne: Mr. Strimel, I just offered this photograph to the other members of the jury to save time.

The Witness: In that photograph which I showed you previously the strap was right straight, taut, (948) right across the bale. Now, in the testing machine, over to the right where you see the big indicator, that is where the load in this particular machine is electronically indicated with accuracy within one-half of one per cent.

By Mr. Marshall:

Q. By the way, had that machine been calibrated prior to these tests within a reasonable time?

A. I would say definitely that the machine was calibrated by precision proving rings within a month prior to making the tests, and it has been checked since then.

Q. All right.

A. Now, I didn't explain that there are controls over on the right side below the dial indicator which you manipulate, which in turn makes a hydraulic piston move upwards, which in turn is connected to the top member which pulls the hook upwards, and in this particular testing machine——

Q. Now, is that last fact demonstrated in 3D-7 and 3D-8?

A. In those particular photographs the band is already under test load.

Q. As a matter of fact 3D-7 and 3D-8 were taken at precise points during the testing procedure. What poundage was already on those bands in those two photographs?

A. In the one photograph 3D-7 there was 1500-pound test load on the strap at that particular time; and on Photograph 3D-8 there was 3550 pounds test load on the strap at that (949) particular time that the photograph was taken. The tests were not stopped in taking these photographs.

The photographer just shot them as I was running the actual tests.

Q. And as he shot the photograph were you or were you not in position to observe the dial on your measuring device?

A. I certainly was.

Q. As a matter of fact, these photographs show you standing almost directly in front of it, do they not?

A. That is correct, sir.

Q. I think you may resume the stand. First of all, Mr. Strimel, you have brought into court with you, have you not, the various bands that were actually tested during the time when these photographs were taken?

A. Yes, sir.

Q. Now, on your diagram sheet, of which counsel has a copy, you have five test results by number. Maybe we had better work down here so as not to scratch that railing up there. First I would like you to pick out your test band No. 1.

Now, is that the band from Test No. 1?

A. I believe it is, sir. I would like to——

Q. You look at it.

A. This is No. 4. This is No. 5.

Q. This is 2?

A. This is 3.

(950) Q. This is 1?

A. This is No. 1.

Q. Now, take No. 1 in your hands and see if you can point out on that band where the band was actually placed under the hook or on the hook.

A. This particular section here of the strap which you see is bent tremendously into a curvature. Do you see that curvature in this particular section? Can you see that curvature there sir?

Mr. Byrne: Show me.

The Witness: Right here. That is the section that the hook applied the load to this particular band. You

will note that the band did not break at that particular point where the stresses were the very highest in that whole piece because of the complexity of the nature of the thing.

By Mr. Marshall:

Q. Now, from your experience, Mr. Strimel, can you tell us at what point on that entire band area, using the method you used to test, you would actually find the greatest amount of torsion, tension, stress or strain on that band.

Mr. Byrne: I object to that question. There are too many things in there.

Do you agree with me, Mr. Strimel?

(951) By Mr. Marshall:

Q. Let me ask you one at a time, where would you find the greatest amount of strain on the band?

A. The greatest amount of strain on this band prior to the phenomenon of breaking taking place, took place immediately in that particular section where the hook and the load that was applied resulted in that crimping; then you will notice when the specimen broke there was a nice drawing down and the material flowed, and that is on this particular section here. You notice how it sort of necked down.

Q. By drawing down you mean a stretching or elongation process?

A. Yes, that was the elongation we are talking about that took place.

Q. By looking at that band can you see an actual physical narrowing at the point near where the breaking point was?

A. Yes, sir; yes, sir.

Q. And did you by any chance measure the width of the piece of band at the breaking point?

A. I did not measure its actual width after the break, but it is substantially smaller than other sections of it where it did not neck down.

Q. Would you estimate it to neck down to about three-quarters of an inch?

(952) A. I would say it would be approximately three-quarters of an inch; yes, sir.

Q. Having started out with a 1-inch band.

A. That is correct, sir.

Q. Mr. Strimel, as a preliminary question, on any of these bands which were submitted to you can you tell us whether you observed any area where there was distortion anywhere near the point that you demonstrated as being where the hook was?

A. There was none whatsoever.

Q. As a matter of fact, I will now ask you to examine this band which has been used to raise one of these bales. I ask you to examine that carefully and see if you can find any area of distortion that would in any way compare with the area where you had the hook in your test?

A. There is none.

Q. Let me hold it open for you.

A. It is very difficult for me to even try to tell where the hook was placed in that when it was lifted out of the ship, if this was used as a strap.

Mr. Byrne: You may assume, Mr. Strimel, that it was.

By Mr. Marshall:

Q. As a matter of fact, I am going to call your attention (953) to an area which to me appears——

Mr. Byrne: I must object to this.

By Mr. Marshall:

Q. I ask you to look at the area I am now pointing at and see if you can identify that as compared with the other portion of the band.

A. It is definitely different, but things like that can happen.

Q. Just from bending?

A. From doing things like this, so it is going to look different and it is rather difficult to actually say where the hook was in that particular piece, because apparently the stress in that particular one was relatively low and did not distort it.

Q. All right, now, Mr. Strimel, refer to your chart and tell us at what poundage of pressure Strap No. 1 finally severed itself.

A. Strap No. 1 broke in the strap at a breaking load of 5,150 pounds. That is Test No. 1 identified with Strap No. 1.

Q. All right; did you repeat this process by the use of these other straps?

A. Yes.

Q. Which have been identified as your No. 2, 3, 4, and 5?

A. Yes, sir.

(954) Q. All right; I ask you now to refer to Test No. 2. We will try to keep these pieces together. Again point to the jury the area of crimping where you had your hook.

A. (To the jury) See that?

The Court: The stenographer can't hear you, Mr. Strimel.

By Mr. Marshall:

Q. What did you say?

A. See that particular crimping.

Q. All right. Now, going back to your chart, on No. 1 did you make any record as to what part of the band broke?

A. It broke in the strap.

Q. In some portion of the strap itself?

A. That is right.

Q. As opposed to what other point which you make reference to in some of your other reports?

A. Well, we made reference to straps and buckles and the reduced area where we had the clamp bolt holes.

Q. All right, No. 1 then broke at some point along the flat area of the band; is that correct?

A. That is correct.

Q. Where did No. 2 break, and at what point?

A. That broke at a load of 4,625 pounds and that broke in the strap also—that is, in the side of the strap which is (955) being subjected to the tension load.

Q. Now, it may be questioned later—I will try to clear it up now—on your report I noticed the last three tests have the designation CW. Tests Nos. 1 and 2 have not. Can you tell us what the CW refers to?

A. The CW refers to straps which were brought up by Mr.——

Q. Charlie Wilson?

A. Mr. Wilson.

Q. And can you tell the jury and the judge whether or not the first two bands were ones I had brought up on a previous day?

A. The first two tests made here were brought up by Mr. Marshall previously to the time the CW bands were brought up.

Q. As a matter of fact were they brought up the first day I came and explained the problem to you?

A. I believe they were.

Q. Your test No. 3—tell us where the strap broke and at what point.

A. Test No. 3 broke at a load of 3,300 pounds, but the strap broke at the one-quarter-inch diameter clamp hole.

Q. I am going to hand you Test No. 3 and ask you to point that fact out to the jury.

A. That broke right where we weakened the section by putting (956) the hole in it for the test.

Q. All right.

A. Again——

Q. Turn around toward the jury.

A. —you have it covered up, but you can see the crimping of the band, which was similar to the other two tests which I have previously showed.

Q. All right, sir; I show you Test No. 4. First of all, I will ask you at what breaking point it let go, and where it let go.

A. Test No. 4 broke at 4,100 pounds, and the strap broke near the buckle. We never found all the pieces, because of some of the other material around the lab, but it broke in the vicinity of the buckle.

Q. First of all, I will ask you to show where the hook was placed, and then I would like you to point out to the jury the condition of the buckle.

A. This again is the same crimping as we had before, and you can actually see some physical distortion to the buckle, but the buckle of the section here actually did not break itself. Here is where we had it hooked into the machine.

Q. As a matter of fact, Mr. Strimel, on any of these tests can you tell us whether the bands pulled out of the buckle?

A. It did not pull out of the buckle on any of these tests.

(957) Q. And when you refer to breaking at the buckle can you tell the jury whether you are referring to an actual severance at that point.

A. I am referring to the band breaking at a point in near proximity to the buckle.

Q. All right, I am going to hand you Test No. 5, and, first of all, ask you to point out where the hook was, and then estimate for the record how far that hook was from the buckle itself.

A. The hook was 4 inches away from the buckle in this particular test, and again we have crimping of the strap from the hook, and this particular one broke at a load of 3,600 pounds, and the strap broke in the vicinity close to the buckle.

Q. And as a matter of fact in the particular portion of the band that you had your buckle inserted can you tell

us whether or not that section of the band from where the hook was in through the buckle is still intact?

A. Yes, it is.

Q. And it was in that relative position, was it not—or, can you tell us what position it was in when they were first submitted to you and when you tested it, with respect to that locking device and that little loop in the band?

A. That is still relatively the same position that it was (958) before we started to make the test.

Q. All right, you may resume the stand. Before you go up I have one or two questions concerning this. Now, can you tell us, Mr. Strimel, by physically examining the device which was used by Professor Grosvenor, whether the demonstration that he gave to the jury would be in your judgment or opinion a simulation of a band test of the type of band that we are using or discussing in this case.

Mr. Byrne: It was not intended as such; not offered as such.

By Mr. Marshall:

Q. All right, can you tell us whether or not the basic principle that was discussed by Professor Grosvenor was in fact carried out in your own tests?

A. I would say that the basic principles were not carried out in this particular demonstration——

Q. By this one, you mean.

A. —as was carried out in the test I made, because the high modulus, high load bearing music wire used in this particular test possess a small amount of ductility compared to the large amount of ductility that is apparent in that material, and the only thing I can say at this point—it was a very sound demonstration, believe me. It was a sound demonstration, but it points out that you should not use (959) music wire to hold a bucket of water.

Q. Can you tell us, sir, whether or not the qualitative characteristic of these bands which you tested differs materially from the qualitative component of that piano wire?

A. There is a vast difference in the properties of these two different types of steels. Music wire has relatively high tensile strength with accompanying poor ductility or poor elongation, that is; whereas this other type of material as compared to music wire has much lower tensile values but it possesses a great deal of elongation.

Q. Now, as a matter of fact Professor Grosvenor indicated that when he tested the one foot section of this burlap band he found elongation of approximately 21 per cent. If I recall, you testified this morning that your test revealed an elongation of 19 per cent?

A. That is correct.

Q. Would you be able to comment on what your opinion of the elongation ability of that piano wire would be?

A. I would say it would be about 5 per cent in 10-inch gange lengths, which means going back to about 2 inches it would be much less than 5 per cent.

Q. Now, you may assume the stand.

A. Of course, sir—excuse me—I should qualify that. I should really know the type music wire it is, but generally (960) speaking, music wire has very small amounts of elongation.

Q. And from physically handling that and crimping it are you able to determine generally that it has the characteristics that you attribute to it?

A. Yes, sir.

Mr. Marshall: Take the stand, please.

The Court: I didn't get the breaking points of those bands. One was 5,150, was it?

(Witness hands paper to the Court.)

By Mr. Marshall:

Q. Now, Mr. Strimel, the evidence in this case has been that this hook or a similar hook to the one which you used was the type of hook that was used under these bands to raise the bales. Now I will ask you to assume in each

such bale as is demonstrated on Photograph P-4—I will ask you to assume that hooks are placed in those center bands, and first of all I will ask you whether you have an opinion as to whether it would make any difference whether the hook shell, and I am referring to the end of the hook—whether it makes any difference whether both of them are facing together or facing in the opposite direction?

A. I would say it would make no difference whatsoever based upon the phenomenon of crimping that I saw in the straps that I tested.

(961) Q. As a matter of fact, looking at the hooks in P-4 which show the hooks under two separate bands——

The Court: Let the jury see.

Mr. Marshall: Yes, hold it up for them. I will walk with it in front of them.

By Mr. Marshall:

Q. Now, can you tell us whether or not that hook or those hooks are on a different angle from the position of the hook in your laboratory test, and if so, what is the difference?

A. There isn't enough in this picture for me to tell whether there was any difference or not, because I should be able to see the very top of wherever these ropes were being suspended from to be able to answer that.

Q. All right, I am going to show you Photograph P-5 and ask whether——

Mr. Byrne: Will you hold it up?

Mr. Marshall: Yes, it is the one with two bands.

By Mr. Marshall:

Q. (Continued) I will ask you whether you are able to see sufficient of those two ropes to see the angle at which those hooks are riding under the band.

A. Yes, sir.

Q. Now, sir, can you tell us whether or not the position (962) of the hook in your laboratory test, being in the

almost exact vertical, would apply greater stress and strain to that band which you tested than is manifested by the position of the hook under those bands in P-5?

A. In our laboratory tests we made a straight-line vertical pull.

Q. All right; stop right there. By that do you mean, sir, that this band was actually placed in a position where it was not properly seated in the hook? (Demonstrating) By properly seated——

Mr. Byrne: I object to that question. This is Mr. Strimel's testimony. He is a good witness; why not let him testify?

By Mr. Marshall:

Q. Sir, can you tell us whether the hook in your test rested flat?

Mr. Byrne: I object to Mr. Marshall's testifying.

The Court: Yes, how did it rest?

By Mr. Marshall:

Q. Come down here and I will hold this for you, and you may twist the band in whatever position you want. Now, show us how this band rested. Move the band as you see fit.

A. You hold the band and I will take the hook.

Q. All right; now show the jury how this band was seated in (963) the hook in your test.

A. There was no particular effort at all to put the hook in there any way, any way the thing came, except the one test where we tilted the hook like this in reference to the assembly, and as we started to apply load, why the thing straightened out.

Q. And when you said you put the hook in like this you had it turned to about a 45-degree angle?

A. We tilted the test fixture. You should tilt your hand, Mr. Marshall, lowering the one and raising the other. See, the thing was like this, and was sort of doing this

business of sliding around and finally seated itself in the middle.

The Court: I don't think the jurors could hear you or see that.

By Mr. Marshall:

Q. Stand behind me and I will hold this high.

A. In other words, that test fixture we had, we tilted like this.

Q. Indicating that the band was on about a 45-degree angle?

A. And as we started to pull, the hale came over and the thing eventually slipped into the middle again, of course.

Q. Now, in that particular test can you tell us whether or not there was more strain and stress—more strain placed on the band than if you had found the center of that band in (964) the test device.

A. I would say that there were phenomena going on there which I would not attempt to stress analyze, because it is pretty complicated.

Q. And can you express an opinion as to whether there would have been more substantial strain than having seated the test device in a perfectly level position and pulled directedly up?

A. Yes, because any time you make a test which is like the particular one we have just described you have a tendency to introduce another variable in there which is difficult to predict.

Q. Now, Mr. Strimel, from these crimped areas on your tests 1 through 5 are you able to tell whether or not this band was seated flat on the anvil as I now have this band held?

A. Regardless of how the thing—the hook—regardless of what position the hook was in with relationship to the strap at the start of the test, under the test conditions why

it automatically straightens up and crimps the band like is visible in all the specimens.

Q. Can you tell us whether that crimping actually takes place in the bottom well of this hook and snell?

A. Yes, it takes place in a point which is directly in line with the pull that is being applied to it.

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(966) By Mr. Marshall:

Q. I want you to assume that the bales weighed approximately 1100 pounds—let us assume somewhere between ten hundred and fourteen hundred to allow a larger variable—that these bales were taken out of stowage of a ship by means of the hook and rope device referred to as Exhibit No. which you have had an opportunity to examine, and that the hook you used was similar to the hook there being used, that these bales, once broken out of stowage, were brought to the center of the hatch opening and centered there, and that on the particular occasion with which we are concerned these three bales, with two hooks under two separate center bands of each of the three bales, were then lifted by a crane by a winch device by means of these hooks being placed under these bands; I want you to assume that the bands in question being used to raise those bales were similar in character to the bands which you tested. I want you to assume further that there was no jerking upon these bales or bands, that there was no hooking, that there was no obstruction with any other object, and that the speed with which they were being raised was a reasonable (967) lifting speed. I now ask you whether you are in a position to express an opinion as to whether or not it would be a safe procedure to use such bands for lifting such bales under that particular set of circumstances, based on your tests.

A. I feel that I am in a position to make some kind of statement about it based upon my tests, plus the fact that I was in court the day that Professor Grosvenor testified

that material of this type should have a safety factor of 4 to 5 to 1.

Q. Well now, limiting yourself to the question which I have asked you, and if you choose to take into account the safety factor mentioned by Professor Grosvenor—limiting yourself to that, and based upon the tests that you made, the results of which you have told to the jury, tell us what your opinion is, your professional opinion, as to whether or not that was a safe method of unloading these bales of burlap.

A. It was a safe method because if you do simple arithmetic you will have a safety factor of 7.7 to 1, rather than a 5 to 1, or 4 or 5 to 1, which Professor Grosvenor stated was safe for this type of operation.

I am not myself in a position to be able to ascertain directly whether a thing is safe or not, but I can testify to the fact that I definitely feel they are safe because of other testimony I have heard, and because of the (968) tests that I personally made.

Mr. Byrne: Then I will have to ask that the witness's opinion be stricken, Judge Ganey.

The Court: That is right.

Mr. Byrne: I move to strike out the witness's opinion.

The Court: Strike out the opinion.

By Mr. Marshall:

Q. Mr. Strimel, I will now ask you to limit yourself only to the hypothetical question which I submitted to you, to Professor Grosvenor's 5 to 1 safety factor ratio, and strictly limiting yourself to those facts and your own tests, without taking into account any other factors are you with that information at hand in a position to express an opinion as to whether you would regard the use of such bands as safe in lifting weights roughly 1000 to 1400 pounds under the circumstances I outlined to you?

The Court: Don't answer.

Mr. Byrne: Objection.

The Court: What is the ground?

Mr. Byrne: The ground for the objection, sir, is if he were asked if he can state an opinion with reasonable scientific certainty whether it is a safe practice, not this individual's own personal opinion, but based upon (969) his experience as an expert.

The Court: Well, I would make that assumption.

Mr. Byrne: That is right, but Mr. Marshall very carefully worded his question, and I therefore object to the question on that ground. It has to be an opinion, as I understand it——

Mr. Marshall: A scientific opinion.

Mr. Byrne: Scientific, certainly.

Mr. Marshall: I assume he is not testifying as a plumber here.

Mr. Byrne: No, I agree he is no plumber; he is a good man.

By Mr. Marshall:

Q. I will ask you whether, assuming all those facts, you can express an opinion with a reasonable degree of scientific certainty as to whether the use of these bands constituted a safe unloading procedure.

Mr. Byrne: Are you able to express an opinion?

Mr. Marshall: That is the question, taking all that into account.

Mr. Byrne, would you please let me ask my question.

The Court: Yes, Mr. Byrne, don't break in. When you object we will hear you.

(970) By Mr. Marshall:

Q. Assuming all those facts, can you express an opinion with a reasonable degree of scientific certainty as to whether the use of those bands constituted a safe unloading procedure?

A. I am in position to make that statement based upon the tests I made.

Q. And based on the hypothetical question I submitted to you outlining the factors involved, what is that scientific opinion?

A. This method is perfectly safe for unloading the bales which weigh 1000 or approximately a thousand.

Q. A thousand to 1400 pounds?

A. A thousand to 1400 pounds.

Q. Now, you mentioned a simple arithmetical calculation. Did you at my request determine the average breaking point of the five bands which you tested?

A. Yes, I did.

Q. And what did you find that figure to be?

A. I found that the average breaking load of the five bands which we tested as described previously was 4,155 pounds.

Q. Now, did you further, using 1,090 pounds as the weight of one bale, and roughly 550 pounds as the weight on one band, at my request then reduce those figures to what you found to (971) be your safety factor?

Mr. Byrne: Objection, simply on weight, sir; the testimony here is 1000 and 1400.

Mr. Marshall: All right.

The Court: That is well taken.

By Mr. Marshall:

Q. Tell me, sir, assuming that the weight of one of these bales was 1100 pounds, what would be the safety factor with respect to a single band where two such bands were used per bale?

A. It would be around seven; in fact, it would be actually 7.7.

Q. All right, now, if you used 1400 pounds as the weight of the bale and 700 pounds as the average weight per band, would you kindly compute that safety factor?

A. It is a little less than six; it will perhaps be about 5.9. That is just a mental calculation.

Q. In other words, it would be dividing 700 into 4,155?

Mr. Byrne: Is that what you did? Divide 700 into 4,155?

The Witness: I divided 7 into 42 and said, it is a little less than 6.

Mr. Byrne: All right; I just wanted to know what you did. I am sorry to interrupt you.

• • •

(972) CROSS-EXAMINATION.

• • •

(973) By Mr. Borowsky:

Q. Assume, sir, that the bales of burlap that have been described to you weighing between 1000 and 1400 pounds measured in dimensions 4 feet by 3 feet by 2 feet, and (974) weighed, as I say, between 1000 and 1400 pounds; that they were stowed tightly on the deck of the hold in rows, tier on tier; that at one o'clock in the afternoon the bales were discharged by means of taking Exhibit P-1 or a similar device to Exhibit P-1 and inserting two of those hooks into the center bands of each of three bales; then, having the hooks in those three sets of bales, the draft would be pulled out of stow, put into the center of the hatch, settled there, and then raised vertically up to the top of the topside deck, some 30 feet, where after it cleared the opening of the deck it was carried in a horizontal manner across the deck and then lowered down to the pier; that this operation had been going on for three hours; that on a particular occasion three bales

in a row underneath or practically even with the opening of the hatch, in front of which had already been removed other bales; were then connected by means of P-1 by inserting two hooks under two center bands in each one of these three bales; that that draft was then moved into the center of the hatch, was directly underneath the opening, and then it was raised up with exactly the same speed, in the same manner, without touching anything, without any jerks, until it reached a height of approximately 20 or 30 feet, at least 5 feet below the topside deck, when suddenly the two center bands of a particular bale broke and that bale dropped; the (975) remaining two bales stayed on the hook; that bale that dropped was then later removed by putting the two hooks into two end bands, the only remaining bands: Assuming all those facts to be true, and relying upon the knowledge that you gained in your experimentation with bands such as these which have been identified as P-7, can you tell us if that particular bale possessed the same characteristics as these bands would it have broken under those circumstances?

Mr. Byrne: That is objected to.

The Court: All right, give us your reasons—whatever you want—let us have them quickly.

Mr. Byrne: The witness has not seen Exhibit P-1, I suggest—or perhaps he had. The question is not the issue in this case, Judge Ganey; it is not whether it was defective at the time that it broke; because Mr. Borowsky is specifically referring to Exhibit P-1 in his question.

Mr. Borowsky: That is P-7; P-1 is the rope with the hooks.

The Court: That is what I thought.

Mr. Byrne: All right; if that is P-7 I withdraw my objection.

By The Court:

Q. All right, let us have your answer, Mr. Strimel, please.

A. It should not have broken unless there was something (976) wrong with the materials.

Q. Now, by materials, what do you mean?

A. The bands.

Q. The bands or bales?

A. The bands.

Q. Bands?

A. Yes.

• • •

(993) The Court: Ladies and gentlemen, so you may understand, I don't want in any way to preclude counsel from asking any question, a hypothetical question, with respect to tearing or shearing or anything else, but I want it understood by the jury that there is actually no evidence of tearing or shearing here.

Hypothetical questions have been posed, and they may be posed, to an expert witness, but that is your job to find out, whether you believe the experts one way or another; but I don't want repeated references to tearing or shearing on either side to suggest to you the thought that that is actually a fact proven in the record; it is a hypothetical question posed to this witness and to the other witnesses. The same question was posed to Mr. Keeler, I believe. I want you to understand that there is no proven fact—because the band is not here—whether it sheared or tore. These are (994) hypothetical questions posed to the witness for answer.

• • •

(1014) RE-DIRECT EXAMINATION.

By Mr. Marshall:

• • •

(1016) Q. And could you compare the degree of tension at the time instantly before it broke compared to the ten-

sion that would normally be used to lift a thousand-pound bale or a 1400-pound bale by means of two such bands?

A. The load to lift the bale—or due to the fact that the average of the five tests which I made, and I have it here——

Q. 4,155 pounds.

A. —was 4,155 pounds, and the weight of half a bale is either 700 or 545, based upon whether it is 1,090 or 1400, the stress is much less lifting the bale than the loads which were applied during the tests which I performed.

* * *

(1022) WILLIAM A. TONER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Marshall:

Q. Mr. Toner, what is your occupation?

A. I am the manager of Atlantic & Gulf Stevedores.

Q. Manager of what port?

A. Port of Philadelphia.

Q. Keep your voice up. Tell us how long you have been (1022a) port manager.

A. Since 1943.

Q. Prior to that what was your employment?

A. Oh, I had been a longshoreman, and superintendent, and hatch boss.

Q. All right; since 1943 have you had experience in unloading Ellerman and City Line vessels with cargoes of bales of burlap and gunnies?

A. No, not with Ellerman-Bucknall, sir; we started doing Ellerman-Bucknall after the war.

Q. In what year?

A. In '45, I think, right after the war.

Q. Since 1945 has your company engaged in unloading bales of gunnies for either Ellerman or other companies?

A. Yes, sir.

Q. Now, were you present on the vessel on July 1, 1955, when one of your employees, Leighton Beard, was injured?

A. I was on the vessel.

Q. All right, sir; can you tell us what if any conversation any of the ship's officers had with you concerning the method that was being used to discharge those bales of gunnies?

A. No, sir; the foreman went down to start the ship, Mr. Nelson. I came down about quarter to. I went on the vessel, and then I walked to No. 4 hatch, went back to No. 1 hatch, (1023) saw they were started. At that time I went over to the office in answer to a telephone, and when I came back Mr. Beard was lying in the driveway on a 4-wheel trailer. I was on there up till 3:30. I think it was approximately 3:30 when he was injured.

Q. During the time you were on there, first of all, were you known to the officers of the ship as being the port manager for Atlantic & Gulf?

Mr. Byrne: I object.

The Court: Objection sustained.

By Mr. Marshall:

Q. Can you tell us whether you knew personally or knew by identification the officers of the ship?

A. Yes, sir.

Q. All right, can you tell us, sir, what if any criticism was made, or suggestion of new method, or any other matter relating to the devices and the methods by which your people were unloading this vessel, if any, was made?

A. It has never been suggested or changed.

Q. Can you tell us, Mr. Toner, what the present method of unloading bales of gunnies is by Atlantic & Gulf Stevedores?

A. We discharged the "City of Bath" this Monday, and we picked up bales weighing 1700 pounds with the identical same (1024) hooks for Ellerman-Bucknall, and

we discharged the "City of Agra" last Friday, bales of burlap, with identically the same hooks.

Q. Whose vessels were those?

A. Sir?

Q. Whose vessels were those?

A. Ellerman & Bucknall.

Q. And can you tell us whether or not the same procedure has been used on all the Ellerman and City Line vessels since July 1, 1955, to the present time?

A. The same method has always been used.

Q. Can you tell us, Mr. Toner, at any time since July 1, 1955, to the present time, what if any directives, suggestions, criticisms, or any other such matter has been brought to your attention by any of the ship's officers on any of these Ellerman and City Line vessels?

Mr. Byrne: Objection.

The Court: Objection sustained.

Mr. Marshall: Your Honor, I think I have a right to establish——

The Court: Not suggestions and directions—he can tell what happened.

Mr. Marshall: O.K.; excuse me.

By Mr. Marshall:

(1025) Q. Can you tell us, Mr. Toner, what if any criticism you have had called to your attention by any of the officers of any of the City or Ellerman ships on which you have unloaded bales of burlap since July 1, 1955, up to the present time?

A. It has never been criticized. No suggestions.

* * *

CROSS-EXAMINATION.

By Mr. Borowsky:

Q. How about before July 1, 1955? How were you handling discharge of bales of gunnies?

A. See, we took over for Ellerman & Bucknall—I say "we"—Atlantic & Gulf Stevedores took over Ellerman & Bucknall in about '38. I came with them in '43, so therefore in '38 I wouldn't know what would be the procedure which would go from '38.

Q. Of what you have personal knowledge since you came to Atlantic & Gulf, and when you had anything to do with the discharge of bales of gunnies, what methods did you use?

A. Used the same method as we have always used.

Q. Discharging three bales at a time?

A. That is correct.

Q. With two hooks in the bands, two bands on each bale?

A. That is correct.

Q. And could you give us some idea since 1943 how many times (1026) Ellerman Line vessels have been so discharged by Atlantic & Gulf?

A. On the India run I suppose they have two a month, so that would be approximately thirty-six vessels a year.

• • •

(1027) Q. —do you know how many bales had broken bands on this particular discharging operation in Philadelphia, on this occasion?

A. On that day, that was the only one.

• • •

(1031) Q. Now, Bill, what tests were made by Atlantic & Gulf Stevedoring Company of the strength of these bands prior to July 1, 1955?

A. We made no tests.

Q. Well, I realize that, but you sent it out to Tinius-Olsen or someone like that to make the tests?

A. Who?

Q. Atlantic & Gulf?

A. No, sir; we didn't send any out.

Q. In other words, you never had any tests?

A. No, sir.

Q. Never knew what the tensile strength of this material was?

A. No, sir. We test our own gear, but not the other fellow's gear.

• • •

(1032) Q. Therefore, your men—I mean your actual hatch foremen or men that worked down in the hold never had any instructions as to any particular place at which they should apply these hooks?

A. It is accepted method——

Q. Now, Bill, I asked you about instructions.

A. I say yes, they have instructions.

Q. All right, go ahead.

A. It is the accepted method by a band of that size, that has been put in the bands and been lifted since the years, that what you do with your hatch boss is give him instructions in safety, and that safety is first to be sure that the hook is inserted in the bale properly, and is in there and it is seated before it is ever lifted.

• • •

(1033) RE-CROSS-EXAMINATION.

• • •

(1034) By Mr. Borowsky:

Q. All right, first of all, have you ever tried to discharge these bales in slings?

A. You can't.

Q. I say, have you ever tried?

A. No, sir.

Q. Now, you have said you can't.

A. I will say you can't. I say "can't" because you would injure the fabric, just as Tom is talking about those that is already stowed, trying to get them into the bales, into the wires.

• • •

(1035) By Mr. Byrne:

Q. Bill, you knew that they were brought on the ship to be stowed by means of slings, didn't you?

A. I wouldn't say I did.

Q. Well, you don't know?

A. No, sir; I don't know.

Q. If you were informed that they had been brought aboard by slings would that change your answer to Mr. Borowsky's question that the use of slings would damage them?

A. Stowing them onto a ship and into stow is easier than bringing them out of stow and discharging them. You can put it in there, but you can't bring it out in the same method that you put it in.

Q. You mean——

A. You see, when they put them in, they put them in and then push them back, these Indians keep pushing them back. You can't get the Indians there to push them back because they are all backed up against the bulkhead.

Q. You can work that, can't you, Bill?

A. No, you can't get to the first one.

Q. Once you make a hole in the stow you could do it by slings, (1036) couldn't you?

A. No, I don't think you could without injuring the fabric.

* * *

(1040) Mr. Borowsky: If the Court please, I should like to offer my rebuttal evidence.

I should like to offer in evidence the answers to Plaintiff's Interrogatories 17A and 17B which relate to the (1041) dimensions of the hold in question. The interrogatory reads as follows:

"Give the dimensions of No. 1 hold, No. 1 hatch"—and apparently they construed that to mean hatch opening—and the corresponding answer:

"Dimensions of No. 1 hold: Over-all length, 45 feet; breadth aft to tank margin approximately 26 feet; breadth forward to tank margin approximately 5 feet 6 inches; grain capacity 12,181 cubic feet; bale capacity 11,723 cubic feet; height after end approximately 14 feet; height forward end approximately 14 feet; dimensions of No. 1 hatch 20 feet 3 inches by 14 feet 2¼ inches."

I should like to also offer in evidence the log entries of June 29 and June 30 which deal with the vessel being in the Port of New York prior to its docking in Philadelphia.

* * *

REBUTTAL ON BEHALF OF ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.

(1966) BERNARD PORIER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Byrne:

Q. Mr. Porier, are you connected with any organization? Do you work for a company?

A. Yes, I do.

Q. What company?

A. Frank B. Gunn Company.

Q. What is your occupation with that company?

A. I am a surveyor.

* * *

(1967) Q. And was any such examination made of the cargo arriving on the SS "City of Calcutta" on or about July 1, 1955?

A. Yes, it was.

Q. And by whom?

A. By myself.

• • •

(1049) Q. I see; and directing your attention particularly to this discharge of burlap or gunnies in Philadelphia on July 1, 1955, did you at that time make any record with respect to the bands binding the burlap into bales?

A. Yes, I did.

Q. And that was made when?

A. It is in my report.

Q. It was made at the time?

A. I mean, the damage or the broken bands were found on the pier.

Q. All right.

A. At the final inspection of the cargo.

Q. Just previously what did you report at that time? Give us the exact language.

Mr. Marshall: Does he have his report?

The Witness: I don't have my report here, (1950) Mr. Byrne.

• • •

By Mr. Byrne:

Q. Mr. Porica, I show you something which has been marked Exhibit D-4 in this case and ask you what it is.

• • •

The Witness: After we give the stowage we say, "The following notations were made during the discharge of cargo," and under burlap I have several markings. Do you want me to read that exactly, including the typographical error.

By Mr. Byrne:

Q. Yes.

A. Number of bags sighted with metal bags broken, covers torn and contents exposed, a few bales sighted slightly cut. Now, if I may there is a typographical error

in there. It should be "bales" rather than "bags." I have referred to it as "bales" throughout and I guess the young lady who typed it made an error there and I didn't pick it up when I signed the report.

• • •

(1054) The Court: All right; cross-examine.

By Mr. Borowsky:

Q. You say you have seen bales of cargo of the size we are talking about, 4 feet by 3 feet by 2 feet, weighing in excess of 1000 pounds discharged as a whole cargo from a vessel?

A. I don't understand, Mr. Borowsky. I don't know what you mean by "a whole cargo."

Q. There was a witness who testified that maybe some bale would get stuck some place where you could not get it with hooks and you would have to get it out some other way. Is that the kind or type of situation you are talking about, or are you talking about the regular discharging operation using slings?

A. Mr. Borowsky, let me ask you this. I have seen on a very few occasions—and mind you I say very few—I have seen them use slings, yes.

Q. Where, please?

A. I saw that in New York.

Q. Do you know what company?

A. No, I wouldn't know, sir. At that time it didn't mean (1055) anything to him.

Q. Are you sure they were bales of gunnies?

A. Yes, they were, the same type.

Q. Was it a whole ship or a whole hatch or very few?

A. No, it was very few, a small quantity of bales.

• • •

The Court: Let me ask, how far away from this were you when you saw them. Were you on the pier?

A. No, I was on the ship, Your Honor.

The Court: You were on the ship.

The Witness: We always do; yes, sir. We are down in the hatches, as a matter of fact.

The Court: Were you in the hatches on this occasion?

The Witness: When?

The Court: When they were discharging by slings.

(1056) The Witness: I wouldn't want to say, sir; I don't know whether it was in the hatch or on top. Probably on top, on the deck.

The Court: How many bales did you see discharged? Give us your best estimate.

The Witness: I believe it was a shipment of twenty-five bales, that particular one.

The Court: How were they taken out, one bale to a sling?

The Witness: No, sir; two bales.

The Court: Two bales to a sling.

The Witness: Yes, sir.

The Court: How long ago has that been?

The Witness: Oh, I wouldn't want to say when it was, Your Honor; I don't recall.

The Court: Do you know the name of the ship?

The Witness: No, I don't, because the thing to me at that time didn't mean anything.

The Court: Is that the only experience you had?

The Witness: I believe that was the only time. There might have been one or two other times when I saw a few bales discharged by slings.

The Court: I don't believe I can let him (1057) testify. I don't believe he has the qualities—all right.

By Mr. Borowsky:

Q. This report you have made, sir, covers five days, July 1 to July 5, 1955, does it not?

A. If you say so.

Q. Look at it.

A. Yes, it does.

Q. I don't want you to take anything for granted.

A. Yes, it does.

• • •

(1058) Q. So that the entire deck of the orlop—or the entire orlop deck was covered from one side of the ship to the other and from the forward bulkhead to the after bulkhead with bales of gunnies; is that correct?

A. That is what this would indicate, yes.

Q. Now, you don't say how many tiers there were; is that correct?

A. That is correct.

Q. There were also bales of gunnies in No. 3 tweendeck, weren't there?

A. That is correct.

Q. There were also bales of gunnies in No. 5 tweendeck, were there not?

A. Yes, sir.

Q. There were also bales of gunnies in the No. 6 lower hold?

A. Correct.

Q. You say you made your determination as to the number of broken metal bands on the pier; is that correct?

A. Yes, sir.

Q. That was after everything had been discharged?

A. Correct.

(1059) Q. And you use the words "a number of bags," and you say that is a typographical error?

A. Yes.

Q. Now, you did have bags aboard the ship?

A. Yes, but not burlap; burlap does not come in bags.

Q. You had bags of bones.

A. That is correct.

Q. You say "a number of bags." Now, you discharged at several piers, did you not?

A. I believe the bones were discharged in Camden.

• • •

(1066) A. W. GROSVENOR, previously sworn, recalled.

• • •

(1083) CROSS-EXAMINATION.

By Mr. Borowsky:

Q. Doctor, do I understand you to say that there is tension in the band when the bale is packed? Do you agree that there is some tension in it?

A. I agree. Yes, I agree.

Q. What is the tension you found?

A. I didn't see a bale. I don't know.

Q. You don't know?

A. Oh, no.

Q. Well, do you think it could be anywhere near 4,000 pounds?

A. Could be; yes.

Q. So that if that is true, and you found that it breaks at 3,700 pounds, you couldn't lift a bale one inch without the band breaking, could you?

(1084) A. On the particular band I had, no, it could not be—it could not be initially stretched to 4,000 pounds; but I tested only one band; Mr. Strimel tested another; his came higher than that, so it is conceivable that a band could be stretched initially. Mine couldn't.

Q. In other words, what you are telling us is that a particular band might come on this bale on which the mere touching of an object like this, and exerting the slightest amount of pull to it would cause a band to break?

A. I did not imply that, no.

Q. I say, isn't that a fact, though? From what you just said, if his band can withstand 5,000 pounds, and your band can only withstand 3,700 pounds, and if you agree that the initial tension can exceed the 3,700 pounds, then the slightest touch to lift that would break the band.

Mr. Byrne: Objected to.

The Witness: Wait a minute, Mr. Borowsky.

The Court: Objection overruled.

The Witness: Wait a minute. I think we are picking a figure out of here and a figure out of here; let us take them all out of the same place. If we take my band which has a tensile strength of 3,700 pounds, then the yield strength is 3,020 pounds. That means if you stretch that band up to the yield strength it would have 3,000 pounds (1085) tension in it.

By Mr. Borowsky:

Q. All right.

A. All Mr. Strimel said was, the bands had been stressed to the yield point.

Q. All right, let us take 3,000 pounds.

A. All right.

Q. In order to lift 1,100 pounds you have to add a force of 1,100 pounds to the initial stress you would have in the band?

A. Oh, no, we take half of it, because we have two bands, two hooks, and we take half of that because we have a cable going both ways—we take one-fourth.

Q. I thought you could not divide it in half; you are pulling at an angle.

A. In that picture it is carried on two cords, half of it on each one, so it is in the band. I divided by 2 up there.

Q. Now, is that correct—if you pull at this angle you are dividing by 2.

A. If you are pulling at any angle—flat or at any angle—you divide by two because two bands carry it, two sides

of a band, then in the actual lifting of these bales there were two bands which divided that load by four, so if the bale weighed—how much? 1200 did you say?

(1086) Q. Well, there is testimony from 1000 to 1400.

A. Well, 1200 is easier to divide.

Q. Wait a second; let us take 1400, because the 1400 would break your band, wouldn't it?

A. No, I didn't say so.

Q. I will say so.

A. Well, let me divide by 4. I will answer the question, if you please.

Q. All right.

A. 1400 divided by 4 is 350, I believe, isn't it?

Q. Why divide it by 4? You have two straps.

A. If you turn to my picture there, we have at the hook a band coming down each side, and so each half of that band carries half of that load.

Q. Right.

A. So I divided there the total load by 2, because he loaded—Mr. Strimel had only one band with a hook under it. In the actual hoisting you have two bands. That divides the load by 4. That means 350 pounds on each band additional to the 3,020, and that does not bring it up to its breaking strength; and you can do the same thing for his figures or any other figure.

Q. Mr. Grosvenor, I am not interested in what Mr. Strimel said; I am only interested in trying to establish certain (1087) basic facts that have confused me and may possibly confuse the jury. Do I understand now that what you are saying is that instead of dividing the lifting force by 2, because it is carried by two ropes you divide by 4 because it is pulling the band as well as being carried?

A. Oh, no, are you talking about lifting a bale or Mr. Strimel's test?

Q. I am talking about lifting a bale.

A. All right; lifting a bale, as I heard the testimony and saw the pictures, there are two hooks, each hooked under

a band. That immediately divides the load of 1400 to 700 per band, doesn't it, or per hook?

Q. Right.

A. Now, the fact that each one of these bands has a lead in either direction from the hook, we again divide it by 2, which makes 350 pounds. May I draw you a picture to illustrate?

Q. No, no. If you feel that it is necessary—I understand your testimony. It seems to be contrary to what has been said before, by dividing the thing in half; now it is divided in quarters, and I assume that when you divide it in quarters your safety factor increases twice as much as it would if you divided only by one-half.

A. You should be an accountant; you can certainly juggle figures, Mr. Borowsky.

Q. Well, isn't that a fact?

(1088) A. Well, you just take figures out of thin air and ask me, isn't that a fact? I would like to have a definite question, and I will try my honest best to answer it. Let me draw one little picture, will you, please.

Q. If you will let me ask you one question.

A. All right.

Q. Then you can draw the picture after the Court declares a recess. You will have plenty of time to do it.

Mr. Byrne: I think if the witness wants to illustrate an answer to a question which Mr. Borowsky has asked——

The Witness: That is right; I want to illustrate my answer to your question.

Mr. Borowsky: Let him answer one or two questions; then he can draw all he wants.

Mr. Byrne: I am objecting to interrupting in effect the answer of the witness with a second question until he has finished his preceding answer. If it is necessary to draw a sketch, Mr. Borowsky ought to give him opportunity.

The Court: Let him answer it. He is now Mr. Borowsky's witness, not yours. He can ask him a question; then you can take him back. If you want him to draw a picture, you may have him draw it. Mr. Borowsky is entitled to have it answered fully. If you can't answer it without drawing a (1089) picture, that is another matter.

A. Well, I can. I just wanted to explain.

By Mr. Borowsky:

Q. Let me ask you this question, and then I think you can draw the picture.

A. All right.

Q. Let us take a single band on a bale, a single band in the center of that bale.

A. Right.

Q. You have a single hook and a single rope.

A. Right.

Q. That band may come from the factory with 3,000 pounds tension on it—3,200, you said; right?

A. 3,020.

Q. All right, 3,020. Now, if you were to take a hook and you were to lift that bale with the center band, the hook in the center band, one band, you would have to exert a force one pound greater than the weight you were trying to lift; is that correct? And if this weighed a thousand pounds you would have to at least exert 1,001 pounds to raise it; is that correct?

A. That is correct.

Q. So that you would have 3,020 plus 1,000——

A. No, no, no. If you want to ask the questions and let me (1090) supply the answers.

Q. All right, then you explain why——

A. If you have one band around it and it is under a tension of 3,020 pounds initially——

Q. Yes.

A. —and the bale weighs 1,000 pounds, and you put a hook under it and lift, then each leg of the band——

Q. I didn't say "leg."

A. Well, I did. I will describe the analysis, please.

Q. O. K.

A. I object to your doing my calculation for me.

Q. All right, I stand corrected. You are talking about the band, not the hooks. You are talking about the band?

A. I am talking about the band, yes. It is analogous to that picture being supported by two wires.

Q. Very good.

A. So if we have a thousand-pound bale hanging by one hook, then 500 pounds of weight is carried by one side of the strap and one side of the hook—500 on one and 500 on the other. That makes 3,020 plus 500 or 3,520, which is under the tensile strength.

Q. Now, if that particular bale happened to be one that weighed 1,400 pounds, then if you divided it in two because the band was now taking it on two legs, then you would exceed (1091) your tensile strength, would you not?

A. It seems to me you handed me a little blue book and said that according to the Safety Code they lift by two bands.

Q. Now, look; I am asking you a hypothetical question.

A. All right, it is a hypothetical question.

Q. Nobody said you lifted these with one band.

A. All right, it is a hypothetical question.

Q. But in my hypothetical question, wouldn't that be true? If it weighed 1,400 pounds the band would break?

A. That would be—yes; that is right.

Q. All right; now, let us put two bands around it.

A. All right.

Q. And you are now going to divide, as I understand it, the 1,400 pounds between the two bands?

A. Right.

Q. And as you lift, under those bands you say there is a further division of one-half going to one leg and one-half to the other; is that correct?

A. That is right; that is correct.

Q. Now, all I am trying to get at, because this is something that we have not heard up till now—if I am trying to determine the safety factor of that band, am I correct that I divide not one-half because there are two ropes holding on to the band, but by one-fourth because in addition to the (1092) division of the force by the two ropes there is also a division by the band, one going in this direction and one going in this direction from the hook?

A. But you forgot my formula, Mr. Borowsky, which would magnify that somewhat.

Q. Well, roughly speaking, would that be correct?

A. Oh, yes, roughly speaking.

* * *

(1096) By The Court:

Q. Did you in any wise estimate the tension that was on these bands as they were baled previously to lifting? Did you have any way of knowing what that tension was?

A. It could have been measured in this way, Your Honor——

Q. No, I mean did you know?

A. Did I? No, I did not know the tension.

Q. You did not know. Isn't that a factor that throws out (1097) of kilter any way of determining with any degree of accuracy what the lifting capacity of these bands was? Not knowing that, can we tell what——

A. That is precisely why, as I told Mr. Marshall, I did not attempt any, because I didn't know what tension was in them.

* * *

By The Court:

Q. How can the jury—my point is—be guided as to this expert testimony when we do not know, for one reason or another; the bands are not here; we do not have the bands that broke, or the band that broke. How can we know what the lifting capacity of these bands was if we don't know what the tension in the bands was previous to their lifting, as they lay there coming from India in the hold of that ship.

A. We can't know; therefore we have a totally unknown safety factor, and it was the basis for my statement that it is not a safe way to do it, because we don't know those things.

Q. Isn't all this to a degree conjecture? I don't want (1098) to disparage very able and very intelligent men; but minus, absent that tension, how can we tell whether these bands were fit for the purpose for which they are intended, or whether there was any negligence—I don't want to go into that; maybe that is a legal question—but how can you tell or anybody tell what the lifting capacity of these bands was?

A. One can't without knowing the tension.

• • •

By Mr. Borowsky:

Q. Just one question: The one test that you made and Mr. Strimel made that had nothing to do with the tension of the bands was the one where you cut down the area of a simple piece of band and your calculation showed that would break at (1099) 3,700 pounds and his calculation showed that it would break at 5,000 pounds.

A. We tested apparently different bands.

Mr. Byrne: I object to Mr. Borowsky's question, because you are not quite right.

Mr. Borowsky: I beg your pardon?

The Court: You may take him back. Objection overruled.

By Mr. Borowsky:

Q. The difference, then, between one band and the other was that one was 74 per cent as strong as the one that Mr. Strimel tested.

A. Yes, that is true, and I think in a large measure the reason for it is the variability in initial tension which will stretch the bands. The band that I tested shows evidence of having been stretched.

Q. I see.

A. And I think it is that rather than the initial quality of the steel.

Q. So that there may be and there was actually in this particular case a variation as markedly as—one was three-quarters as strong as the other.

A. Yes.

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(1100) RE-DIRECT EXAMINATION.

By Mr. Byrne:

• • •

Q. Could that stretching have occurred at the time the band which you tested and the band which Mr. Strimel tested were actually used, perhaps, to raise the cargo out of the ship?

A. Certainly.

(1101) Mr. Byrne: That is all.

Mr. Marshall: I have no questions, thank you.

By Mr. Borowsky:

Q. Just a moment, please. It could also have been caused by the very mechanism of banding these bales?

A. I don't think that would be a very big factor, Mr. Borowsky, for this reason, that the press from some of the letters I saw in Mr. Byrne's office,—that the press is squeezed down to a certain load, so many pounds of load on that. The bands are already loosely around the bale, then they are tightened up, not pulled up by some device, but pulled up taut, then when the press is released that puts within reason a pretty uniform stress on them.

Q. Well, I may be awfully dull, but I just thought you explained to His Honor the reason that you could not determine the strength of these bands was that that particular factor, the original tension applied, was the unknown factor and it could vary a great deal.

A. Well, when the bales were loaded aboard ship and when they were unloaded again, that again adds more load and may cause an entirely different amount of tension.

Q. Yes, I understand that, but I did not ask you that question. Please stick to my question. Didn't you just explain to His Honor that there could be a great deal of variation in the (1102) tension originally applied to these bands?

A. I did not say originally; I said "present in the bands." Now, they might have been picked up in India and stretched——

Q. All right.

A. —or not. I don't know.

Q. Aside from the picking up, whether it be in India, Hoboken, or Philadelphia, does it make any difference as to the initial tension put on these bands, which has been explained to us as being almost to the yield point or beyond the yield point initially?

A. Well, I have no way of knowing that the baling stressed them to the yield point; neither does anyone else, because hoisting was done on all of these. They have been stressed beyond the yield point, but whether it was totally the baling pressure or whether it was partly—whether it was the sum of the baling pressure plus the lifting, I don't know —because all of the bands that we have had, and in Mr. Strimel's test, and so forth, they have all been used for hoisting as well as baling.

Q. Then you think that you could have made a much better test by having a band off a bale that had not yet been lifted out of the hold; is that correct?

A. Yes, I would want to know, however—I am not now implying that the baling pressure is widely variable, but I (1103) don't know what it is—I would have to know about what it is. That could be determined if I had a bale that had never been hoisted. Then what I would do is put one of Mr. Strimel's strain gauges on it and arrange a device for gradually letting the tension off until it quit changing, and

working backward, then I could say then how much tension that band had in it initially, but once hoisting has been done on it, then I say it is such a variable thing.

Q. In other words, the hoisting factor, you say, throws out of kilter the entire test you performed?

A. Yes.

Q. Or that Mr. Strimel performed?

A. That is right.

• • •

(1105) By The Court:

Q. Mr. Borowsky confuses me a bit—I do not mean that disparagingly—I mean his question. How can you tell the breaking point of this band? We are concerned with this load, (106) because there were loads all afternoon. How can you tell what the breaking point of this band was, not knowing the tension at the time the bale was lifted? Can you tell us?

A. No, I can't.

Q. Nor can Mr. Strimel tell us?

A. That is right.

• • •

(1118) The Court: Let us take Mr. Byrne's; they are a little shorter, and in the interest of time——

Mr. Byrne: Are we talking about interrogatories?

The Court: I am talking about the suggested points for charge. No; wait a minute; interrogatories. Your interrogatories.

Mr. Marshall: These are the plaintiff's.

Mr. Byrne: Is there any objection.

(1119) The Court: These are the defendant's. These are Mr. Byrne's. Have you a copy of your points for charge there, Mr. Borowsky? I mean your interrogatories suggested to the jury.

Mr. Borowsky: Yes.

The Court: I have them but they are on my desk.

Mr. Byrne: It seems to me that that points up the issue——

The Court: "Was there any negligence on the part of the shipowner which caused or contributed to the plaintiff's injuries?"

Mr. Byrne: Perhaps "contributed" is wrong; perhaps it should be "caused" or "was a substantial factor."

The Court: That is the point I wanted to bring out—was it a substantial factor.

Mr. Byrne: All right, "which was a substantial factor in bringing about."

The Court: I don't say that we will adopt these, but I would like both opposing counsel's suggestions; it may well be that we would include them all later, but I think "caused" or "was a substantial factor" is——

Mr. Byrne: "In bringing about the plaintiff's injuries."

Mr. Marshall: May I say at this point, sir, (1130) that I am reserving my right to object to the use of any interrogatories. I am not acquiescing in the use of any of these.

The Court: All right. Which caused—we use "caused" twice—"Which caused or was a substantial factor in causing."

Mr. Berowsky: Was there any negligence on the part of the shipowner which was a substantial factor in causing the plaintiff's injuries.

The Court: All right, "Which was a substantial factor in causing plaintiff's injuries."

Mr. Byrne: I will accept that.

Mr. Berowsky: It seems to me at that point you have got to put in the unseaworthiness. You can't jump around to something else.

The Court: I think we can. I am afraid, if we don't, unless you go down the line for negligence and down the line

of unseaworthiness, we might understand it but the jury won't. I am afraid that you jump from one to the other. I think the order in which Mr. Byrne has them here is quite all right.

Now, "Did Atlantic & Gulf Stevedores, Inc., unload the SS 'City of Calcutta' in a safe, proper and workmanlike manner?"

(1121) Mr. Byrne: Those three words, sir, are taken because they are the language of the Ryan case.

Mr. Borowsky: It seems to me if you are going to use the word "negligence" in the first question then you are actually asking the second question.

The Court: Yes; isn't the second question virtually an enlargement of the first?

Isn't a safe, proper and workmanlike manner really a question of fault or blame?

Mr. Byrne: All right, if the Court in its general charge will say something like this, quoting Ryan, "Failure to discharge it in a safe, proper and workmanlike manner would constitute negligence."

The Court: That is right.

Mr. Byrne: Then you can substitute the word "negligence" in the second interrogatory.

Mr. Borowsky: I don't think it is fair to describe negligence in one case without describing it in the other. In other words, No. 1 therefore should read, "Was there negligence on the part of the ship in not stopping this operation if they thought it was dangerous? Was there negligence on the part of the ship for permitting a stow which had to be split in the middle of a hatch, one way or the other, causing the men to have inadequate protection under the decks of the (1122) vessel? Was it negligence"——

The Court: That is the first one, now.

Mr. Borowsky: Yes; I say, if you are going to define what is safe, proper and workmanlike manner, then I think you ought to define negligence up here.

The Court: Well, I think you should. I think the Court will define what the negligence is that you assert. Now, that is the ship's negligence, you understand. Here we are coming to Mr. Marshall's—"Were the Atlantic and Gulf Stevedoring Company unloading the 'City of Calcutta' in a safe, proper and workmanlike manner?"

Mr. Borowsky: That is not an adequate question. It still has to be a substantial factor in causing the injury.

The Court: Yes, he comes down to that in the next question.

Mr. Borowsky: Isn't he getting two questions in for one? He ought to have the same thing that is here: Did the Atlantic & Gulf Stevedores unload this ship in a negligent manner so as to be a substantial factor in causing plaintiff's injury? Then you can determine later on which is the sole and which is the concurring factor, but you still have to have proximate causation.

The Court: I think it concerns Mr. Borowsky, because the jury may well find the negligence was the sole (1123) negligence of Atlantic & Gulf.

Mr. Byrne: That is the verdict I am hoping for; no question about that.

The Court: Therefore the plaintiff could not recover against you; therefore there is no case and Mr. Marshall is out.

Mr. Byrne: Certainly.

The Court: It seems to me that in that second question there ought to be whether or not there was a contributing cause, whether or not they were joint tort feasors.

Mr. Byrne: We cannot be joint tort feasors.

Mr. Borowsky: Yes, you can; you can be joint tort feasors as to me.

Mr. Byrne: Mr. Borowsky, can't I finish a sentence?

Mr. Borowsky: Well, don't sound so final, Tom.

Mr. Byrne: There is no evidence here that would support a finding of joint tort feasorship, Your Honor.

Mr. Borowsky: There is, Your Honor, for several reasons. No. 1, if the chief mate of this ship thought it was unsafe, his duty to our man is exactly the same as it was to a member of the crew; he had a duty to stop (1124) it.

Now, if the manner of discharge was unsafe, then they are both hooked. That is only one point. Suppose these bands—and there is absolutely no contradiction of the fact that these bands are ordinarily used for this purpose, which is exactly the same as the cases which spell out unseaworthiness. If there is unseaworthiness combined with negligence on the part of the stevedores, I still have the right to recover.

The Court: I think that is right.

Mr. Borowsky: There is no question about it.

The Court: I think if there is negligence on the part of the shipping company in failing to stop the operation, coupled with negligence on the part of the longshoremen employees of the stevedoring company, to that extent if they are joint tort feasors, there is no defense available to you.

Mr. Byrne: Judge Ganey, may I point out something? We would never get to the question of whether we were under any duty to stop the operation until you have a finding by this jury that it was a negligent operation. You see that is denied. That is denied. Mr. Marshall has been in here for two days offering evidence that it was in all respects a proper operation.

(1125) The Court: I say, I am not saying that they must. If they so decide, that it was an improper discharge——

Mr. Byrne: That is right.

The Court: —if that improper discharge, coupled with the negligence of the longshoremen in a sub-standard performance caused the injury——

Mr. Byrne: It would not be coupled with it, sir; it would be based upon it. In other words, before Ellerman would have had any duty to stop the operation the jury must first make a finding that the operation was improper.

The Court: That is right.

Mr. Byrne: All right; so that is why you do not have joint tort feasorship.

Mr. Borowsky: That doesn't hold at all.

Mr. Byrne: Just a moment, Mr. Borowsky. That is why you don't have tort feasorship. You have, A, the Ellerman Lines being held liable for failure to stop B doing a negligent act, so therefore you have B in there, but they are not in the same degree. One is the active negligence, although I don't like that term; one is launching the instrumentality for harm, and the other is the failing to become an instrumentality for good. Now, the man who throws a banana peel in front of Gimbels store, and Gimbels, who may be held liable because they leave it there for three hours (1126) until a pedestrian comes along, are not joint tort feasors.

Mr. Borowsky: They are as to the plaintiff, Your Honor; as between you, that is something else.

The Court: It may well be that the failure to stop this work and its continuance as an improper discharge was linked with improper conduct of the stevedores unloading.

Mr. Byrne: That is right.

The Court: The improper discharge of the ship, the failure of the ship, letting it continue on, and the stevedores working in the hold of the ship not removing this New York cargo out of the way, for instance——

Mr. Byrne: That is right.

The Court: In that, they could concur.

Mr. Byrne: They could concur in point of time, sir, but that is not——

The Court: And that could be the proximate cause of the injury.

Mr. Byrne: All I want, Your Honor, is an interrogatory to the jury which will delineate whether they so find or not.

Mr. Borowsky: That is exactly what I want.

The Court: Then we all agree. Certainly the concurrence of negligence is no bar to the plaintiff's recovery against you.

(1127) Mr. Byrne: No one said that.

The Court: I thought you did. Then we have been talking at odds.

Mr. Byrne: Mr. Borowsky and Mr. Marshall are both very anxious, because of the interest they represent, concurring at certain points, at least, that this jury shall make a finding that there was joint tort feasorship here, and therefore there can be no indemnity under the Halcyon case. I would be blind if I didn't see that.

Mr. Borowsky: Just a moment.

Mr. Marshall: I would like the record to show that that is not my intention or my desire.

The Court: That doesn't make any difference. All of you should be as keen and as apt to protect your client's interests as you can, and to get every ounce of it. If you were not you would not be worth your salt.

Mr. Marshall: If you will look at all his questions, Judge, I don't think we get half a fair shake here, because obviously if the answer to the second question is no——

The Court: To save time, you agree that concurring negligence under proper circumstances, if the jury so found, defining what it was, Mr. Borowsky is not barred by the fact that there could be concurring negligence?

(1128) Mr. Byrne: Judge Ganey, if you are submitting interrogatories, if this is a question of law it is for you to use in molding the verdict based upon the jury's answers as to questions of fact or conclusions to be drawn from factual evidence.

The Court: But, first, we must agree as to the law; then frame them.

Mr. Byrne: Can we agree after the verdict?

The Court: And in framing them we have to know the exact point of law that we want the jury to decide, and that is all I am trying to get here, as I stated originally.

Mr. Borowsky: That is exactly what I spelled out in Interrogatory No. 4: Was there negligence on the part of the Atlantic & Gulf Stevedores, Inc., in failing to discharge the cargo in a safe and proper manner or in furnishing improper equipment and appliances to discharge the cargo which was a substantial factor in causing the plaintiff's injuries? Yes or no? Then the next question is, Was the negligence on the part of Atlantic & Gulf Stevedores, Inc., the sole cause of the plaintiff's injuries, which would eliminate our case for negligence, or was it a concurrent cause?

Now, what Mr. Byrne is leading to is the ultimate adjustment if there is a concurrence between the so-called primary and passive negligence, and so on, which, if (1129) you are going to ask the jury to decide, it seems to me that there is one further question you have to propound to them, and that is, which of the factors was the more substantial factor? Or use some word to comply with the latest decision of the Supreme Court of the United States.

The Court: Well, Judge Hand used "responsible." I think we are indulging in semantics. I think getting away

from major and minor is probably right. I say, probably they are getting away from it, but at least we agree that concurring negligence would not be a bar to the plaintiff.

What other factors are there in the negligence side of your interrogatories? That is about the end of your interrogatories on the negligence angle, isn't it?

Mr. Byrne: Yes, it is.

Mr. Marshall: Well, obviously, if that is the case, as I see it 5, 6, 7 and 8 have no meaning, because they are just refinements of possible inferences of negligence.

Mr. Byrne: By no means.

The Court: No, they go to unseaworthiness.

Mr. Marshall: The thing I have against his No. 2, the way it was framed, covers all the problems, yet you would have to reply to 5, 6, 7 and 8 which are just petty refinements of No. 2.

Mr. Byrne: By no manner of means are they—(1130) by no manner of means.

The Court: No, because there could be unseaworthiness here.

Mr. Byrne: Created by Atlantic & Gulf, of course.

The Court: Fitness for purpose of use, and still negligence.

You are satisfied generally, if, for instance, the negligence which you allege covers stowage, the situation of the bales in the hold, the improper—are you relying on improper discharge?

Mr. Borowsky: No, sir; I am relying——

The Court: You have sort of steered away from improper discharge here.

Mr. Borowsky: I want to make sure Your Honor understands the wideness of the scope of my claim for unseaworthiness.

The Court: No, let us stay to negligence.

Mr. Borowsky: I say negligence is of three varieties in this case. First of all, I will argue to the jury that the ship knew that these bales were going to be discharged this way, and if there was any obligation ever to test the bands it was on the part of the ship and not on the part of the stevedores.

(1131) Mr. Marshall: That is right.

Mr. Borowsky: And I will argue, I think very logically, to Your Honor that if any correction was to be made to these bands, or if this was to be shipped in a safe way in small packages, it was the shipowner's obligation to safeguard the men who come on the ship, under American law, to pass that information on to the shipper, but I think it is evident that the shipper knew about it, because if he packaged it this way he could not stay in business and compete with American goods, and he put those bands on knowing full well they were going to be used to discharge with hooks, so I say that the very act of putting in a bale of burlap with bands or that you have to be a college professor to safely discharge creates an unseaworthy condition.

The Court: Let us stay to negligence.

Mr. Borowsky: All right; it also creates an unsafe place to work.

The Court: All right.

Mr. Borowsky: That is one point. No. 2 point, this officer says that he regarded the method of discharge as being unsafe. He did nothing effective to stop it. I say that is a ground of negligence. He has to safeguard that longshoreman just like a member of the crew, and he failed to do it.

(1132) No. 3, they had put into this hatch, into the center of the square of this hatch, cargo destined for two dif-

ferent ports. They had been to New York; they never discharged the New York bales. We don't know why. But if those Philadelphia bales were being discharged, then there is testimony in this case that if a bale dropped, but if those bales had been discharged, there is testimony in this case that if a bale dropped it would not have bounded into the wings; it would have gone maybe five or eight feet.

Mr. Byrne: There is no such testimony.

Mr. Borowsky: Yes, there is. You brought it out by Mr. Nelson; so on that ground there is an unsafe place to work created by the manner in which this cargo was stowed, knowing full well that if the Philadelphia bales were going to be pulled down it would leave an unevenness at the square of the hatch which only measures 20 feet in length, so that a bale dropping down there is going to strike a New York bale. I say that is another ground of negligence. They are the three principal grounds on which I rely. I think there is more in this case, and I may think of another one before the afternoon is over.

The Court: Weren't they largely merged into an unsafe place to work?

Mr. Borowsky: No, I think an unsafe place (1133) to work, Your Honor, is akin to unseaworthiness, and I have therefore given three interrogatories, not two. I have not said, is this unseaworthiness or negligence? The latest expression by the Court is by Judge Learned Hand and it seems to talk about a safe place to work as an absolute duty. Our Court of Appeals in the Brabazon case said it was based on negligence; you have to show fault, reasonable care. For that reason I have put it in a separate catgory. I think an absolute duty applies to the safe place to work, and I have given a separate category to it, because I can prove fault on the part of the chief mate and on the manner in which the cargo was stowed; that is, the mixture of the types of cargo. But I think there is fault in allowing the very cargo to be put in this hold knowing what they

claim, what they are arguing, that you can possibly lift one one foot and if the tension on that band originally is 74 per cent of another one, it is going to break.

Now, I make my main thrust, however, on unseaworthiness.

The Court: I know you do.

* * *

(1146) Mr. Borowsky: What Mr. Byrne is proposing is what we have in the Goodrich case and many others in the state court—the ingenuity of counsel cannot introduce in the case possibilities that are not based upon fact from which reasonable inferences flow. In the Supreme Court affirmation of the Petterson v. Alaska Steamship Company and in the Ace Tractor Equipment Company, both of which cases I have cited on page 8, the Court in effect says that if you are doing something in a normal, proper way and a device gives way, then the logical inference is that that device was not sufficient. In other words, here all the evidence—and there is no contradiction of this—Your Honor can hypothesize on the basis of what he has brought out that maybe this hook turned and tore; there is no evidence that a hook will tear except at the buckle. The fact is that these men put the two hooks in on the bale when it was flat, in the middle of the band, because the buckles were facing down; that there was no breaking out in the sense that it had to be pried out of anything: There was 8 feet of clear space above the top of these bales, and they were right at the edge of the opening, one behind each other, and that they were brought out to the square of the hatch, that they were raised in a normal, proper manner; that two bands broke—the other two bales were not affected—and (1147) there is evidence today from the experts—their conclusions don't mean anything but they do point one thing up—that some bands are 75 per cent weaker than others. If there is a flaw in the band, that's the Sieracki case, where there was a flaw in the hook.

If the metal in the band is inadequate by reason of the metal they use or the manner in which they band it, it is still the shipowner's responsibility, because again the uncontradicted evidence in this case, as it applies to this case, is the testimony of the chief mate that he expected them to use the hooks and the bands to discharge the cargo.

* * *

(1148) The Court: Now, Mr. Byrne made a great deal of that seating itself, as I understand it, in its going up, of its turning and by virtue of its seating itself it had a shearing effect as it seated itself on the hook, or on the way up it had a shearing or tearing effect. Now, I think he can make a logical deduction if that is in the evidence that it followed.

Mr. Berowsky: Right.

The Court: Both of you stopped there and never said a word. Your objections were not on record.

Mr. Berowsky: If Your Honor please, I have objected a number of times to his referring to the shearing with respect to the buckle. It is my understanding, and I may be wrong, that there is no evidence at all that by placing a hook under the band you will cut the band. If there is, then I think it should be submitted to the jury, but if the only time he brought up shearing was with respect to this buckle, and it is my understanding that that is where it is, the evidence in the case is uncontradicted that the buckle was nowhere near the hooks. How can we introduce that into the case?

The Court: Well, I don't think it was at exactly the buckle; I think it was in the proximity, but we (1149) ought perhaps to get the record straight on that.

Mr. Berowsky: There is no contradiction of the fact that the buckles are on the bottom of this bale.

The Court: That is right.

Mr. Marshall: Judge, I would like to make one point. It may not be directly on this, but I think it may be something that all of us should think about, because if there is going to be any element of surprise on it I want Mr. Byrne to know the nature of the argument. I honestly believe that had our people been directed by Quinn to forget this method and adopt his sling method, and done it exactly as he told them to, in the process of unloading by one means or another if one of these bales fell down and hit one of these men and caused anywhere near the injury here there is not the slightest shadow of doubt in my mind that we would clearly be in violation of our contract; we would be clearly in violation of custom and practice; we would be clearly negligent. And I want Mr. Byrne to understand—if he is going to have any objection to it I want to know it now—I am going to argue to the jury that had we followed that method and this accident happened we would have been totally without a defense here in the light of all the expert testimony and otherwise, and that of the Blue Book and everything else, that the only way that this has been done, can be done, should (1150) be done, will be done, is by the use of hooks and bands.

I just don't like the idea of distorting. The only mention of slings in this whole record was by Quinn and by Perine, and I for one am going to do everything I possibly can with that jury to see that they are not drawn out on a thin limb by that argument.

The Court: I think that is within their limits of comment; but I don't know—is it in the record that slings were a safer operation?

Mr. Byrne: Yes, sir.

Mr. Marshall: No, it has never been tested; never been used.

The Court: I did not want to ask. Did the experts say so? I don't think Kesler said so, did he?

Mr. Marshall: No.

Mr. Borowsky: Mr. Byrne pried out of Captain Wheeler, if I am not mistaken, perhaps out of context, but he did say that you could do this, it is possible to do it, and it might be safer. I think that is about it. There is that one sentence.

Mr. Byrne: That it would be safer, or he agreed with my statement——

Mr. Borowsky: The point is that the chief mate who said they loaded the bales did not say that they ever unloaded (1151) bales in slings, and the only evidence you have—unless you have a very unusual situation where a bale is caught behind something so you can't get it out with hooks—is the testimony of the last witness, the cargo surveyor, who wasn't sure when he saw it, where he saw it, what kind of ship it was, whether they ever had hooks on that ship or anything else, when he said he saw about twenty-five taken out by bands. On the other hand, of course, there is a great weight of evidence that you cannot possibly do it, and that it cannot be done, and I told Mr. Byrne, and he threatened to ask for the withdrawal of a juror, so I might as well put my argument on record—my argument is that if anybody should test the strength of these bands it is the shipowner. He takes those bales knowing full well the method by which they will be discharged. He has to take them from only four sources. Now, if that band does not hold up, he is setting a trap for the longshoremen, which makes him liable for unseaworthiness.

What better, more logical place is there for him to say to the shipper "Unless you test those bands, and unless you see that those bands are correct, you have to ship your goods in a smaller package, because it is dangerous to handle them this way"?

To show that the shipper knows what is going on, he has put up a bale of this size because it is an (1152) economical package for him to do it, and he knows they

are going to use hooks, because if they did not use hooks they would spend a lot more time discharging these bales. Everybody agrees you would have to have four or five men to push a bale, so he would have to pay more for the privilege of having the ship handle his goods, and it would be uneconomical for him, so he knows what the purpose of that band is.

Now, I want to make that argument. Mr. Byrne, when I mentioned it to him, "You can't do that; I will ask for the withdrawal of a juror."

I say it is more logical for the shipowner to make the test than the stevedore, and I think I have just as much right to argue it as he does that the stevedore go around with a testing laboratory on the pier to test these bales. If Your Honor wants to rule on that before any commotion starts Monday, I submit that is a proper argument that I can make from the facts of the case.

Mr. Byrne: Finished?

Mr. Borowsky: Yes.

Mr. Byrne: I did say to Mr. Borowsky——

Mr. Borowsky: One other point while I am at it. There is also a statement made by Mr. Byrne that the tension on these bands is evident at the place of manufacture, so that the ascertainment of the exact tension could be made (1153) at the point of shipment.

Mr. Byrne: No, I didn't say "tension", Mr. Borowsky.

Mr. Borowsky: Oh, yes, you did. You said you could find out all those things.

The Court: Just a minute.

Mr. Marshall: We will have it transcribed so we will know what it was. I have asked for that portion of the transcript, so I will give you a copy of it.

Mr. Byrne: I will tell you exactly what I said if you are interested.

Mr. Marshall: All right.

Mr. Byrne: I said the amount of pressure used in the compressing machine used to form the bale had been ascertained. I did say to Mr. Borowsky that I would ask for the withdrawal of a juror if he made the argument which he has just outlined, and I should like opportunity to point out to Your Honor why the argument is improper. It is, of course, fair comment in arguing to the jury to discuss any inference that can be drawn from the evidence in the case. It is not, however, fair and proper argument to a jury to discuss questions for which there is no evidence in the case, or questions of law. Now, the only evidence in this case which is exactly on point was extracted from Arthur who was called by (1154) Mr. Borowsky as his expert witness. It was somewhat to the effect that a carrier could not reject cargo that was tendered to it so long as it was packaged in such a way as to protect the cargo during the voyage. The answer was, "Yes, you must accept and carry that sort of shipment, a shipment that meets those criteria." That is the evidence in this case; there is nobody disputing that.

Mr. Borowsky: Yes, I dispute it. You asked Captain Wheeler—wait a second; you asked Captain Wheeler, "How would you handle the unloading of these bales?" He said, "Well, it will take four or five men to get under it. I don't know how they would get under it, but after an hour or so they would be worn out; they couldn't do any more work."

You said, "Oh, it is a question of price, is it?"

He said, "It may be a question of price today, but it is going to be passed on to the shipper tomorrow."

Mr. Byrne: Right.

Mr. Borowsky: So that the shipper would know about the very condition that I am contending.

Mr. Byrne: I say that Mr. Borowsky's argument goes outside the record, is improper, and I will seriously press for the withdrawal of a juror if——

The Court: I would think his comment would be limited to this. I think since Ellerman Lines have taken these (1155) bales in the manner in which they were taken over the years, and knew before and since the manner in which they were discharged, that if they had any objection to the bands or anything else they certainly had a right to protest and they had a right to stop it; they should have said long before this that this was an improper method of cargo being offered for discharge. I think that is about the limit.

Mr. Borowsky: Yes, but if he can argue that the stevedores should make a test I can argue as logically, because there is a greater duty on the part of the ship to protect the men who are going to work the cargo, that the shipowner should test it. He is picking it up at a place where they can correct the condition, where they can say, "I am not going to take this bale; it doesn't meet the test. Take it back and give me another bale."

The Court: What test?

Mr. Borowsky: I am talking about strength of materials. He has an argument here that the stevedore should—or he is trying to work out a duty or a basis for contending that the stevedore did not do what he should do, and as far as that may hurt my client in leading the jury to think there was negligence on the part of the stevedore, and leave out the shipowner, I say that I have just as much right to argue, and just as much basis, that the shipowner should (1156) perform the test.

* * *

The Court: I don't see any objection to arguing about the duty to test. I don't think it is improper. I think you can argue it. I think on the whole general picture the matter lends itself to argument. I don't see any objection.

I think a better argument—but that is not for me to say—would be on the other score, because there is more evidence, but I don't see why he could not comment on the fact that they receive it, they have it, they know it is (1157)

going to be taken out, they know hooks are going to be applied; they have a right to prepare a safe and proper place for employees, and if they feel it is not proper and if it is not fit for the purpose intended, he can argue they have a right to make inspection the same as you can argue your contention.

Mr. Byrne: I am not quarreling with the right; I am quarreling with duty.

The Court: I am not going to quarrel with you on duty.

Mr. Byrne: That makes all the difference in the world, Judge Ganey.

The Court: Well, say "duty" then.

Mr. Borowsky: I submit there may be a greater duty——

Mr. Byrne: That is a question of law. If we contract with somebody we don't tell them what they are going to charge us to discharge it. They can discharge it by hand if they want to.

The Court: Yes, but you know just as sure as you are standing there that when they put it on there, they are going to use that band for unloading.

Mr. Byrne: That is right.

The Court: That makes the difference.

(1158) Mr. Byrne: It doesn't, but it makes the original argument of whether or not Quinn was negligent in not stopping the operation a perfectly legitimate part of this case and I have never contended contrary, Judge Ganey.

The Court: What makes it proper argument is the accepting it as cargo to be carried, knowing that it is going to be unloaded by means of hooks. They have a duty to the seamen to see that that is a band that is proper for the proper discharge of the cargo. I think it is within the fair realm of comment—a duty to do it.

Mr. Byrne: Your Honor is so ruling?

The Court: Yes, sir; I so rule.

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Mr. Byrne: Of course; I understand that; but as I take it now, that is an instruction to counsel?

The Court: That is right; advisedly an instruction to counsel. I do it only because I think it would (1159) hurt both of you to get up.

Mr. Byrne: I do too.

Mr. Borowsky: This is a paraphrase on a case involving a shipment of cashew nuts which the company knew or should have known caused dermatitis in handling. This is what the Court said in the Second Circuit, Anderson v. Lorentzen: "The shipowners are charged with whatever knowledge they would have acquired as to the nature and characteristics of cargo carried on their ship by the exercise of reasonable care to acquaint themselves with the facts and were bound to take reasonable precautions in the light of such knowledge to protect the cargo and those who worked on the cargo."

Mr. Byrne: That is your argument.

Mr. Borowsky: That is not argument; that is authority for the Court's ruling.

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(1170) The Court: I take it there was no agreement on any points.

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Mr. Byrne: Mine are the ones that have the caption at the top of the sheet, Judge Ganey, and I had thought, (1171) according to my notes, that 1, 2 and 3 were what we agreed on before we adjourned from your office.

Mr. Borowsky: Well, we had agreed in substance on the nature of what they covered. I don't think we agreed on specific wording. We were trying to go through them all.

Mr. Byrne: I made notes, and that is why I said that.

Mr. Borowsky: I think it is important that the jury know that the first ground of liability is one based on a warranty, and the word "unseaworthiness" to me is not a sufficient designation. Otherwise it is practically the same except that I have made sure that they understand it is Ellerman Lines against which unseaworthiness must apply. Now, in the damage part of it I have itemized the element of damage, because I think it is a very serious case where each element of damage is important, and they are going to have quite a number of them to consider.

The rest of the questions do not really concern me and I don't want to get into the middle of it except that I understand that the whole purport of it is to find out whether or not if the jury finds my client liable for unseaworthiness or negligence that was caused by some negligence of the Atlantic & Gulf Company, so I have put that in. I haven't consulted any of the parties about that one. If they (1172) don't agree to it, why——

Mr. Byrne: About which one?

Mr. Marshall: No. 5. That is probably what you had in mind.

Mr. Byrne: I have tried to frame 4, 5 and 6 in terms of the contract, Judge Ganey. I thought that 1, 2 and 3 represented a meeting of the minds as of about 6:40.

The Court: That is true, but that only concerns itself, as I think Mr. Borowsky says, with negligence.

Mr. Marshall: No. 1 deals with unseaworthiness, but does not spell out against whom.

Mr. Byrne: I have no objection to unseaworthiness of the ship or its appliances. I have no objection.

Mr. Marshall: Look at No. 1. Doesn't that pretty much tie it up? This is his No. 1 and this is your No. 1. I think we ought to take them one at a time; we will get some place.

Mr. Byrne: When you incorporate, as I see it, breach of a warranty of seaworthiness you are confusing a question of fact and of law and the jury is supposed to find fact.

Mr. Borowsky: You are asking for legal conclusions in all of these.

Mr. Byrne: No, I am asking them for findings.

(1173) Mr. Borowsky: No, you are asking for negligence, which is a conclusion.

What is so bad about calling a thing what it is? It is a warranty, and it is a breach of warranty; why not label it as such?

The Court: I do not see much difference, except really semantics, in either.

Mr. Byrne: I think there is a great deal of difference.

The Court: Where is the difference?

Mr. Byrne: I think that No. 1 submitted by Mr. Borowsky is a request to this jury to find out whether there was unseaworthiness, and I think that is the fact issue before them.

Mr. Marshall: That is just another way of saying in the first line, was there a breach of warranty of unseaworthiness?

Mr. Borowsky: What is unseaworthiness but breach of the warranty of seaworthiness?

Mr. Marshall: That is right.

The Court: I don't know; I wouldn't insist on that. I intend to define seaworthiness and ask whether this was a seaworthy condition. I don't see that anyone is hurt in leaving it out.

(1174) Mr. Byrne: No. 2 is, of course, the language we agreed upon on Friday, and there is no question about that.

No. 3, I don't think you need to underscore again the various items of damage which you give this jury in your

charge and underscoring any other elements in the case by giving them a written copy of your charge, for example, and I think you do precisely that if you itemize.

Mr. Borowsky: I think in this case, as I have stated, Your Honor, there are these various elements which ought to be considered, which the jury has an obligation to fix a value on. There is no harm in it and I notice that several of the judges insist on it.

Mr. Marshall: Judge, my only point on that would be that I have no quarrel with itemizing damages, or actually any of these interrogatories, except that my basic belief is that when you put something in the hands of the jury to answer certain specific questions, I think by the very nature of the human being they tend to emphasize and highlight those specific things, many times to the exclusion of equally important factors which you and we as counsel may overlook, and that is really the basis of my objection to using any specific findings, because I don't think that any four lawyers or judges can crystallize fairly in the minds of the jury five or six questions which fairly answer this (1175) case. I think the jury might give equal——

The Court: No; I am going to take Mr. Byrne's suggestion as to 3. You can elaborate all you want, but I think the best thing is to tell them to assess the damages, and I will advert to them and you may advert to them in your argument. That is all right; I think 3 is sufficient. I think if you lay it out like that it may tend to convey the thought that the Court thinks there are damages here. There are a lot of things that interrogatories such as this, I think, sort of tend to emphasize unduly. I will advert to all of them and you can advert to them in argument. I think "In what amount, if any, do you assess the damages of the plaintiff?" ought to be the interrogatory posed.

Mr. Borowsky: Do you have any objection, Your Honor, if I put a chart up, without putting any figures on it, just the elements?

The Court: No, I won't permit any charts in my court. I won't permit any elements with any suggestion—even charts.

Mr. Borowsky: Just the elements of damage?

The Court: No, I won't permit it.

I think these first three interrogatories are all right. I am going to submit them as they are.

Mr. Marshall: You mean Mr. Bryne's, with the (1176) caption on?

The Court: That is right.

"4. If you have answered as to Interrogatories 1 or 2, did the fault of Ellerman arise out of any failure on the part of Atlantic & Gulf Stevedores to do its work with the utmost care?"

Mr. Byrne: "Utmost care" is out of the language of the contract.

The Court: I think that is right. I have it here.

Mr. Marshall: That is right, but we are picking two or three words out of the 4-page document.

The Court: I am going to read it to them. I think that is right. Wait a minute; it is "with every due care," isn't it?

Mr. Byrne: On the last page.

Mr. Marshall: Page 3, about three paragraphs from the bottom.

The Court: "Utmost care and attention and pay promptly"—I think that is all right. Have you any objection to that?

Mr. Marshall: Yes.

Mr. Borowsky: Yes, I object. I think if it is going to be made on the basis of contract to take one phrase (1177) out is wrong. I think you ought to say "Failure on its part

to do its work in accordance with its contractual obligation."

The Court: I think that is all right.

Mr. Marshall: I think Mr. Byrne will agree with me—maybe you won't—but at the time of our meeting, where we spent about two hours, the next question was agreed on as Mr. Borowsky's No. 4, and this is after Byrne's No. 3: "Was there negligence on the part of Atlantic & Gulf Stevedores which was a substantial factor in causing plaintiff's injuries?"

I think we have just as much right to have that in No. 4 as Mr. Byrne has in No. 2, because it is identical language.

Mr. Byrne: Well, I didn't agree then and I told you——

The Court: Wait; I didn't get that. What was that?

Mr. Marshall: We discussed Mr. Borowsky's No. 4, the language which we put together in his office, and I would agree to that No. 4 because it falls within the same general language as Byrne's No. 2; in other words, was there negligence on the part of Ellerman which was a substantial factor? Then the item of damages. Then, was there negligence on the part of Atlantic & Gulf which was a substantial factor in causing plaintiff's injury.

(1178) I think that that falls naturally under No. 4 rather than the one Mr. Byrne suggests as No. 4.

The Court: Except that Atlantic & Gulf Stevedoring Company's damages, while measured in tort, are a breach of a contractual relationship.

Mr. Marshall: Yes.

The Court: And I think that ought to be pointed up, and 4 does not encompass that.

Mr. Marshall: But he comes right back at me with No. 5, "Did Atlantic & Gulf perform its work in compliance with the terms of the contract," and he can't pull two words out of one interrogatory and then hit me with the whole contract in another separate one. I object to it.

The Court: If you have answered Interrogatories 1 and 2 yes, did the fault of Ellerman arise out of any failure on the part of Atlantic & Gulf Stevedoring Company to do its work?

Mr. Marshall: I would say in accordance with the terms of the contract.

The Court: "In accordance with its contractual obligation?"

Mr. Marshall: All right; I would not object to that.

Mr. Byrne: I would not object to that.

(1179) Mr. Marshall: Because that covers 4 and 5.

The Court: We will get to 5 in a minute.

Mr. Marshall: I have to anticipate that Mr. Byrne is going to pick that contract up and read those few words.

The Court: Isn't 5 repetitious then, Mr. Byrne?

Mr. Marshall: Yes.

Mr. Byrne: It is, sir, but 4 points up something that 5 does not, and that is why it was designed that way. In other words, is Ellerman's negligence in 4 derivative of Atlantic & Gulf's?

No. 5, I had this in mind, Judge Ganey—suppose the jury answers 1 or 2 affirmatively and finds Ellerman negligent or unseaworthy, but they also find it was something that was created by Atlantic & Gulf. That was the purpose of 4. Now, 5 is completely different. In other words, if they answer 1 and 2 in the negative, and answer 5 in the affirmative——

Mr. Borowsky: If they answer 1 and 2 in the negative they don't have to answer anything further; you know that.

The Court: Wait a minute, Mr. Byrne; you say "fault of Ellerman arises out of its contractual obligation."

Mr. Byrne: That is right. "Was Atlantic & Gulf's performance in compliance with the terms of its (1180) contract?"

The Court: In 5?

Mr. Byrne: I guess you are right, Judge Ganey.

The Court: 6. If you have answered "No" to Interrogatory No. 5——

Mr. Marshall: That will be No. 4 now.

The Court: Cross that out. That will be No. 4. Did Atlantic & Gulf's breach of contract contribute substantially to the injuries to the plaintiff?

Mr. Borowsky: Where does that get us? Concurrent negligence?

Mr. Byrne: No, it establishes causal relationship.

Mr. Marshall: Then I think we ought to have a similar one for Ellerman Lines.

The Court: Oh, no, you have to find the proximiate cause of the injury.

Mr. Marshall: That has to be done generally, but I say, Judge, if you are going to have causal relationship highlighted as against me it ought to be highlighted as against Ellerman too.

Mr. Borowsky: Just a moment, Your Honor——

The Court: There is a great deal of difficulty in preparing interrogatories. I think "substantially" is (1181) all right. I have read the cases and I cannot find where the Court defines the criterion which measures breach of warranty in the contract of performance.

Mr. Byrne: You mean the stevedore's contract?

The Court: Yes.

Mr. Byrne: It seems to me the Supreme Court——

Mr. Borowsky: Before we get away from this interrogatory I want to point out something that makes it

ridiculous in a sense. You have asked in the question before it if there has been any failure on the part of Atlantic & Gulf to do its work in accordance with the terms of the contract. That is its contractual liability.

The Court: That is right.

Mr. Borowsky: If you answer "No" to it, you cannot say, did its breach of the contract contribute substantially to the injuries? They have already said no to it.

Mr. Marshall: See that, Mr. Byrne?

Mr. Borowsky: It doesn't make any sense.

Mr. Byrne: I think it does. Did Atlantic & Gulf perform its work in accordance with the terms of the contract?

The Court: Wait a minute; we are leaving 5 out. 4 and 5 are too much alike.

Mr. Marshall: No, in No. 6, Judge, the number (1182) has been changed to 4.

The Court: I know, but the only thing I can see is that Interrogatory No. 5 is to be No. 4.

Mr. Byrne: Oh, then No. 6 has to be yes.

The Court: Yes, you are right, Mr. Borowsky; it is yes.

Mr. Byrne: Yes.

The Court: Did it contribute substantially to the injury? I think that is all right.

* * *

(1184) The Court: Don't you think there should have been something akin to the burden of going forward? Here is a ship that had docked at New York. This New York cargo was still in it, and there was a portion of it in the square of (1185) the hatch. There has been no explanation for its being there. The stevedores were here called on to discharge Philadelphia cargo.

Mr. Byrne: That is right, but——

The Court: I am not saying they should: I think it is a jury question as to whether it was a stevedore's or a shipping company's responsibility. True, there is no evidence here as to what the stevedore should have done. What should they do? Should they clear the hatch?

Mr. Byrne: It is right in their contract.

The Court: Anything about the hatch?

Mr. Byrne: I forget the language. I can find it in a moment.

Mr. Borowsky: They only shift it when necessary to work your cargo.

Mr. Byrne: Oh, no.

Mr. Borowsky: But here was cargo that was stacked at the same level as the Philadelphia cargo, Your Honor, and you hit on the point when you said that the negligence is allowing it to get in the middle of the stow. It wouldn't make any difference whether they took off the New York cargo first or the Philadelphia cargo; in either event you would have in the middle of the hatch an unequalness that would endanger the men working there.

(1186) The Court: I think they shift it whenever necessary, and the question here is whether it should have been shifted.

Mr. Borowsky: You cannot shift it without encountering the same danger. If you take the New York bales out you are going to have the Philadelphia bales two tiers higher in the center.

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The Court: Wait a minute; I am not saying it is their negligence; I think it is a jury fact to determine whether it should have been shifted. Here is was in a part of the center of the hatch. Should they have shifted a few bales? Not the whole New York cargo. Should they have just cleared the center of the hatch? Was that an improper method of discharge on the part of the stevedores or on the part of the ship?

Mr. Borowsky: Your Honor understands that in the act of discharging any bales, before they start the Philadelphia bales you are going to have exactly the same situation you would have if you removed the Philadelphia bales (1187) before the New York bales; you would have a situation where the identical thing might happen. Moreover, this bale fell on New York bales. Had they been discharged it would not have rolled back; it would have fallen in empty space; there would have been no accident in this case.

The Court: Getting back, I don't see any objection. I think this concerns Mr. Marshall.

Mr. Marshall: I have already objected to it.

The Court: Wait a minute; 6. If you have answered "Yes" to Interrogatory No. 4, did Atlantic & Gulf's breach of this contract contribute substantially to the injuries of the plaintiff?

What is wrong with that? That is your liability, frankly—whether it is or not, I mean it is the measure of it; it seems to me.

Mr. Marshall: If you will look at the complaint there are about eight averments of negligence. You are now submitting interrogatories here which absolutely do not mention the word negligence as against us, and you are highlighting the contract, which to me by its own terms has no provision whatsoever for unloading this type of cargo, and that is admitted on the record by Keeler.

The Court: I know, but, Mr. Marshall, you must remember that your liability sounds and is founded in (1188) contract, the breach of your warranty of contractual relationship; you are different from Mr. Borowsky. It is measured only in the sub-standardness of your performance.

Mr. Marshall: Let me say this, Judge. If it will help get this case under way I will agree to No. 6.

The Court: I think we have then 1, 2, 3, 4 and 6.

Mr. Marshall: All right.

Mr. Byrne: May I ask for an amendment to No. 6? Mr. Alspach just pointed something out to me, that when you get into contribution you may get into Halcyon Lines, and so forth, and he suggested simplifying it and saying, "If your answer is yes to Interrogatory No. 4, was Atlantic & Gulf's breach of contract a substantial factor in bringing about the injuries?

The Court: I think that favors Mr. Marshall more. I don't see any objection to that.

(Counsel confer.)

Mr. Byrne: Sir, if I may get on the telephone I can have these retyped by the time speeches are completed.

The Court: I can have my secretary do it.

(Conference at side bar not reported.)

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[fol. 217] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,278

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., and THE CITY LINE, LTD.,
Appellants

v.

ATLANTIC AND GULF STEVEDORES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 18, 1960

Before McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT—Filed April 7, 1961

By KALODNER, *Circuit Judge.*

The plaintiff, Leighton Beard, brought this civil action, founded upon the diversity jurisdiction of the District Court,[1] against the defendants, Ellerman Lines, Ltd. and The City Lines, Ltd. ("Ellerman"), to recover damages [fol. 218] for personal injuries sustained in the course of

[1] Plaintiff is a citizen and resident of Pennsylvania; defendants Ellerman Lines, Ltd. and The City Line, Ltd. are British corporations.

discharging cargo from the latter's vessel, S.S. "City of Calcutta". Beard was a longshoreman in the employ of Atlantic and Gulf Stevedores, Inc. ("Atlantic"), a concern performing stevedoring services for the vessel. Beard's complaint alleged unseaworthiness and negligence. Ellerman joined Atlantic as third-party defendant, alleging in its third-party complaint that Beard's injuries were the result of Atlantic's negligence in discharging the cargo and in using devices which were "dangerous and improper" in doing so. Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The case was tried before a jury, which found in answer to specific interrogatories, in favor of Beard in his action against Ellerman, and against Ellerman in its third-party action against Atlantic. In its answers to the interrogatories the jury found the "City of Calcutta" was unseaworthy and negligent, and Atlantic without fault with respect to the accident which resulted in Beard's injuries. The District Court entered judgment in accordance with the jury's special findings in favor of Beard against Ellerman and in favor of Atlantic against Ellerman in the third-party proceedings. It later[2] denied Ellerman's alternative motions to set aside the verdict in Beard's favor or for a new trial.

Ellerman has appealed, asserting in sum that the evidence failed to establish unseaworthiness or negligence on its part; that the jury's finding that Atlantic was not negligent is inconsistent with its finding of negligence against Ellerman since if there was any negligence it was that of Atlantic; and that Ellerman is entitled to indemnity from Atlantic as "a matter of law", if we find that the record sustains a finding of negligence in the discharge of the cargo.

[fol. 219] The District Court did not file an opinion and it is necessary for that reason to set forth the facts in some detail:

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[2] Ellerman's motions were filed May 7, 1958 and orally argued on June 24, 1959. The District Court's Order denying the motions was filed April 4, 1960.

On July 1, 1955, the "City of Calcutta" docked at a pier in Philadelphia. In its cargo were bales of burlap which had been loaded aboard in India. The bales each contained 30 to 40 bolts of burlap, enclosed in a burlap covering. Each bale, weighing between 1,000 to 1,200 pounds, had been compressed under tremendous pressure and circled with four parallel one-inch steel bands fastened together with a patented clip or buckle. Sixty-three tons of the bales, consigned to New York, were stowed in the forward end of the hold, which, by reason of the shear of the vessel, extended out halfway into the square of the hatch; and 109 tons of the bales, consigned to Philadelphia, were stowed toward the after end of the deck. The bales were stowed on their flat in tiers to the same height, and there was no separation between them except for their markings.

Atlantic's longshoremen started discharging the cargo at about 1.30 P.M. They used what are known as bale or burlap hooks which consist of a metal ring to which six lengths of manila rope are attached. At the opposite end of each rope there was a special flat metal hook. Two of these hooks were inserted under two bands of each of three bales by four longshoremen, two on each side of the bales, and a fifth man put the ring on the cargo hook at the joined ends of the runners from the cargo winches and gave the signal for the draft to be hoisted. The draft was then moved out into the square of the hatch under the hammer of the boom, which was positioned over Philadelphia bales, and hoisted out of the hold, across the ship and then lowered on to the pier.

The first of the bales were removed from the center of the hatch and then the bales were moved out from the wings one row or tier at a time. The New York bales were not touched. There was enough space between the top [fol. 220] tier of bales and the underside of the 'tween deck for the longshoremen to walk into the wings, and as a draft was hoisted they retreated into them.

At about 4.30 P.M. (three hours after the unloading had begun), when two tiers of the Philadelphia cargo had been discharged, a draft of three bales was attached to a set of burlap hooks by the longshoremen. These bales were in a row in the offshore wing under the coaming with ap-

proximately 12 feet of space above. As the draft, in the course of its hoisting, neared the coaming of the main deck hatch the middle bands of one of the bales broke and when the entire weight of the bale was placed upon the other band it too broke, and the bale dropped onto the New York bales, bounced off, bounded across one-half of the hatch, then some 20 to 25 feet astern of the after coaming, and struck Beard, pinning him against the after bulkhead.

Beard was taken to the hospital where his right leg was amputated, first below the knee and shortly thereafter above the knee. He was 41 years old at the time.

The facts, as stated, are not in dispute, nor is there any question presented here with respect to the amount of the jury's award of damages to Beard.

There was considerable testimony at the trial, expert and otherwise, that it was the custom in Philadelphia to use bale hooks in discharging bales similar to the type here involved, known as "gunnies"; that the Safety Rules for the safe handling of cargo, prepared by the Philadelphia Marine Trade Association, and used by stevedore personnel in Philadelphia, approved this procedure.

There was also testimony, by way of deposition of Donald Quinn chief officer of the "City of Calcutta" that Quinn had observed the manner in which the vessel's cargo of bales of wool as well as the bales of burlap were being discharged by Atlantic's men and that "they were going very quickly"; that Quinn had told one of Atlantic's men "with a bit of authority" that he thought the use of bale hooks in discharging the bales of wool "was a dangerous [fol. 221] way of discharging" and that he was informed "it was the custom of the port". Quinn also said that he had "explained" to Atlantic's men that "in India they get wire slings and put them around the bales so that each individual bale has a wire around it, and as they hold it tight, the wire tightens around it."

Quinn, however, did not direct Atlantic's men to discontinue their method of discharging the bales. There was expert testimony that the chief mate is responsible for the safety of personnel engaged in cargo operations and that his authority outranks the stevedore boss.

An expert metallurgist who had tested steel bands similar to those used here testified that in his opinion the particular bands on the bale that broke and struck Beard had "something wrong with the materials".

The foregoing presents the factual situation as presented to the jury.

On this appeal Beard contends that the jury's finding of unseaworthiness is amply supported for these reasons:

"Ellerman had actual and constructive knowledge that the burlap bales would be hoisted out of the hold by use of hooks inserted under the bands of the bales", and, "It was therefore charged with the absolute duty of supplying bands to permit that activity to be accomplished in reasonable safety"; in the instant case "the bands were inadequate", and the burlap bales created an unseaworthy condition because they were not capable of "being handled for the purpose of loading and discharge" by the bale hook method customary in Philadelphia.

Beard further contends that the jury's finding of negligence on Ellerman's part was supported by the testimony that Ellerman had failed to provide him with a "safe place to work" in that (1) Ellerman breached its duty "to use reasonable care to ascertain the methods and manner in which the work was done and to forbid the use of a method which was hazardous to his [Beard's] safety" and the failure of the chief mate to take effective measures to [fol. 222] prevent an unsafe method of discharging the burlap bales constituted negligence; further (2) Ellerman's "failure to discharge the New York bales in that port rendered the place of work unsafe and the defendant negligent", inasmuch as had the New York bales been discharged in New York the bale which had dropped would "normally strike a flat surface and roll or bounce but a few feet", while here the dropped bale "bounced off and rolled all the way to the after bulkhead of the No. 1 hold, one-half the distance of the square of the hatch, and in addition, 20 to 25 feet underneath the after 'tween deck."

Atlantic's position is that the jury's finding, in answer to Interrogatory No. 4, that the "fault" of Ellerman did not "arise out of any failure" on its part, was supported by the evidence that its use of the bale hook method was

customary and not negligent; that the jury's finding that Ellerman was negligent could properly have been premised on its failure to provide Beard with a "safe place to work" in that it had not discharged the New York bales at that port and they were so stowed that Beard was exposed in the discharging operation to the catapulting of the dropped bale which caused his injuries.

Atlantic contends that, for the reasons stated, the jury's finding with respect to it is not inconsistent with its finding that Ellerman was negligent.

The District Court, in its charge, dealt with the theories of Ellerman's negligence advanced by Beard.

On the score of the jury's finding, in answer to Interrogatory No. 2, that Ellerman was negligent, Ellerman' and Atlantic both urge that the answer fails to disclose whether it was based on (1) use of the bale hook method in discharging the burlap bales; or, (2) failure of Quinn, Ellerman's chief mate, to stop Atlantic from pursuing the bale hook method of discharge which he had characterized as "dangerous"; or, (3) failing to provide Beard with a safe [fol. 223] place to work in view of Ellerman's failure to discharge the New York bales at that port and their position with relation to the bales which were being discharged at the time of the accident.

Interrogatory No. 2 which presented to the jury the issue as to whether Ellerman was negligent reads as follows:

> "Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the plaintiff?"

The jury's answer to the interrogatory was "Yes."

In disposing of Ellerman's appeal from the jury's finding that its negligence "was a substantial factor in causing injuries to the plaintiff", we are required only to determine whether there was substantial evidence adduced at the trial with respect to any one of the three theories of negligence on Ellerman's part which measured up to the appli-

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[1] Ellerman says: "It is impossible to tell what conduct by Ellerman was found to constitute the conclusion 'negligence' ".

cable standard of legal proof and thus permitted the jury's fact-finding that Ellerman was negligent.

On the score of whether the record affords a substantial basis for a finding that Beard's injuries were caused by *somebody's* negligence in the discharge of the burlap bales this extraordinary situation presents itself:

Both Ellerman and Atlantic do not really question that sufficient evidence was adduced in the record to establish that Beard was injured as a result of negligent conduct of the discharging operation; indeed they virtually concede that the record establishes such negligence—they only differ as to the nature of the negligent acts and with respect as to who was guilty of the negligent conduct.

Says Ellerman, in its brief:[4]

> "We dispute that Ellerman was negligent and assert rather that the negligence here was *solely* that of the stevedore [Atlantic]." (Ellerman's emphasis.)

[fol. 224] That statement was made in consonance with Ellerman's position that Atlantic was in full control of the discharging of the cargo; it was an "expert in the field"; "It was Atlantic's method of pulling out the cargo, not Ellerman's"; "Ellerman would not be negligent for failing to either supervise or take over and itself perform the details of the work"; and, while Atlantic's negligence would make Ellerman liable to Beard, Ellerman was thereby entitled to indemnity from Atlantic under their contract for stevedoring services because of Atlantic's "sub-standard" performance.[5]

Atlantic, replying to Ellerman's contention here that the jury's finding of negligence on its part was inconsistent

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[4] Page 23 "Brief for Appellant".

[5] In its third-party complaint against Atlantic, Ellerman averred that if it should be held liable to the plaintiff "then the third party is liable over" to it "by reason of" Atlantic's failure "to properly perform the work of unloading"; Atlantic "*was negligent in the manner in which it undertook to unload cargo*"; Atlantic "supplied and used devices in connection with the unloading . . . which were dangerous, improper and, in addition, violated the terms of the [stevedoring] agreement." (emphasis supplied).

with its finding, in answer to Interrogatories Nos. 4 and 5, that Atlantic was free of fault, made this statement in its brief:[2]

> "Appellant [Ellerman] conveniently fails to acknowledge that other issues were submitted upon which *the Jury could properly have found negligence on the part of the shipowner*. Plaintiff, through his counsel, contended that Ellerman was negligent in failing to provide Plaintiff with a safe place to work. Evidence was offered which established that certain New York cargo was not removed at that port, was stowed in a position exposed to this unloading operation and was the very means by which the falling bale was catapulted against Beard. . . .
>
> ". . . *The Jury could properly find and by its verdict undoubtedly did find that Ellerman was guilty of negligence in stowing the New York cargo with the Philadelphia cargo in the center of the hatch opening.*
>
> [fol. 225] "From the description of the accident by all the eyewitnesses, *it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard.* (emphasis supplied).

In view of what has been said it is unnecessary for us to discuss in detail all the evidence relating to the issue of negligence. We have but to say that the record affords ample basis for the jury's finding that Ellerman was negligent.

For example, there was evidence that bands of bales "broke" in "roughly between 3 and 5 percent of the bales" during discharging operations.[3] It is true that there was considerable testimony, as earlier stated, that it was the custom in Philadelphia to use bale hooks in discharging burlap bales and that the method was approved by the Philadelphia Marine Trade Association, but as we held in

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[2] Pages 9-9 "Brief for Atlantic and Gulf Stevedores, Inc., Appellee".

[3] Testimony of Captain William Wheeler, associated with a firm of marine consultants.

Curtis v. Carcia Y Cia., 272 F.2d 235, 237 (1959) "such custom, though it may be evidence of reasonableness, is not conclusive," and the jury may find, if there is sufficient basis in the testimony, that the customary method does "not satisfy the standard of reasonable care."

Further, there was testimony by Ellerman's own chief mate, Quinn, earlier referred to, that in his opinion the use of bale hooks "was a dangerous way of discharging", and that he had "explained" to Atlantic's man that in India, in handling burlap bales they used the sling method.

On the score of Quinn's testimony it must be said that his failure to take effective measures to stop the use of the discharge method which he condemned as "dangerous", would constitute negligent conduct for which Ellerman was liable in the event of a jury finding that the discharging procedure was in fact "dangerous", as he deemed it to be.

Also, there was testimony that those engaged in the task of discharging the bales were exposed to a hazardous situation, by virtue of the stowage of the New York bales [fol. 236] with respect to the bales which were being unloaded, and thus were not afforded a "safe place to work", which is, of course, negligence on the part of those responsible. The testimony on this score, as earlier stated, was deemed ample by Atlantic, an expert in the field, to sustain a finding that Ellerman had failed to provide "a safe place to work".

It is settled law that Ellerman owed to Beard the obligation to provide him with a safe place to work, and its failure to do so constituted negligence.

It is equally settled that Ellerman was under a duty to use methods which complied with the standard of reasonable care in the discharge of its cargo, and to forbid the use of a discharge method by the stevedore of its selection which did not conform to a standard of reasonable care.

"The work of loading and unloading is historically 'the work of the ship's service'", as the Supreme Court said in Crumady v. The J. H. Fisser, 358 U.S. 423 (1959).

Whatever inconsistency Ellerman sees in the jury's answers to Interrogatories Nos. 2 (in which it was held negligent) and 4 (in which Atlantic was absolved from liability over to Ellerman), it is not one which aids Ellerman in Beard's action against it. In answering Interrogatory

No. 2, the jury was determining the issue of negligence between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the contractual obligation of Atlantic to Ellerman. The issue for us on appeal with respect to this Interrogatory is whether as a matter of law Atlantic can be relieved of its contractual obligation in any circumstance of this case. The fact, that the jury believed either that the contractual obligation of Atlantic to Ellerman did not coincide with the duty of Ellerman to the plaintiff, or that Atlantic properly discharged its contractual obligations, if erroneous, would not require that we reverse the finding of liability as between the plaintiff and Ellerman, if that finding is supported by the evidence, as we have found that it does.

[fol. 227] What has been said brings us to Ellerman's contention that if it "is liable to Beard upon a theory of negligence . . . the undisputed evidence required the District Court to enter . . . judgment in Ellerman's favor [against Atlantic] because it was clearly Atlantic's action which brought about the result and clearly it constituted a breach of a warranty of workmanlike service."

Our consideration of Ellerman's contention is controlled by the principles recently summarized in Waterman Co. v. Dugan & McNamara, 364 U.S. 421, 423 (1960), as follows:

"In *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. *This warranty of workmanlike service extends to the handling of cargo, as in Ryan, as well as to the use of equipment incidental to cargo handling*, as in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563. The warranty may be breached *when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 429. . . ." (emphasis supplied.)

Application of the principles stated to the indemnity action compels the determination, under the particular facts

here and the jury's finding with respect to Ellerman's negligence, that Ellerman is entitled to indemnity from Atlantic as a matter of law.

As already pointed out, the record affords ample basis for a jury fact-finding that (1) use of the bale hook method in the discharge of the burlap bales constituted negligence, and (2) that the injured longshoreman was not afforded a safe place to work.

[fol. 228] Atlantic suggests that the jury's finding that Ellerman was negligent was based on its failure to provide a safe place to work in view of the fact that the New York cargo "was stowed in a position exposed to this unloading operation and *was the very means by which the falling bale was catapulted against Beard*", and says that *"the jury could properly have found negligence on the part of the shipowner"* in this situation, *and "it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard."* (emphasis supplied.)

Atlantic hoists itself on its own petard in stating that the evidence established that the New York stow, as positioned when the Philadelphia bales were being discharged, created an unsafe place to work.

Under the principles above stated, the "warranty of workmanlike service to perform the obligations of the contract with reasonable safety", extends to the handling of the cargo, and thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to "handle" the cargo in charged, (sic) created an unsafe place to work.

It was Atlantic's conduct in proceeding to unload cargo in an unsafe place to work which "called into play" the unsafe condition which prevailed, and under Crumady v. The J. H. Fisser, *supra*, it breached its warranty to Ellerman.

What was said in American President Lines v. Marine Terminals Corp., 234 F.2d 753, 759, 760 (9 Cir. 1956), cert. den. 352 U.S. 926, is significantly applicable here:

> ". . . We are not concerned here with a situation in which the stevedore's breach of duty brings about the

injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence . . . and in face of all that [fol. 229] proceeded to breach its duty so as to make that negligence an immediately dangerous force . . . [I]t was the stevedore's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury."

The "expertise" of Atlantic in the handling of cargoes should have made it aware of the dangers inherent in the discharge of the Philadelphia bales in view of the presence of the New York stow. If a jury could "properly find", as Atlantic urges, that Ellerman was negligent in permitting the discharge under the circumstances which prevailed, because of their obvious dangers, it certainly follows that Atlantic, an expert in the field of handling cargo, should have shown an awareness of the situation and taken steps to avoid that which happened or refused to proceed with the discharge of the cargo until the site of discharge was made "a safe place to work."

It must here be noted that the District Court in its charge to the jury with respect to the indemnity action failed to instruct it that if Atlantic carried on the discharge of the Philadelphia bales in a place unsafe to work that it was guilty of a breach of its "warranty [to Ellerman] to perform the obligations of the contract with reasonable safety."

The District Court erred in this respect and to its error may be attributed the fact that the jury, in its answer to Interrogatory No. 4 acquitted Atlantic of "any failure . . . to do its work in accordance with its contractual obligation."

Further, in its charge to the jury the District Court prescribed the "criterion", as it put it, of Atlantic's performance of its contract, as follows:

"You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe

[fol. 230] method used in the discharge of this cargo, in the placing of the hook."

The phrasing of this instruction was such that it made the sole "criterion" of the jury's test as to whether Atlantic had breached its contract of "workmanlike service" in the use of the bale hook method in discharging the cargo.

The error of this instruction, as well as the error committed when the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work, was further compounded by a last-minute instruction to the jury, following conclusion of the charge in chief, and just before the jury retired. The instruction referred to follows:

> "If you find that Atlantic & Gulf Stevedores, Mr. Marshall's client, was unloading the bales in a proper and safe manner, *using a method that was in accordance with the practice, customs, and usage in the Port of Philadelphia,* and that that was not in violation of their breach of contract which obtained between them, *then your verdict must be in favor of the Atlantic & Gulf Stevedores.*" (emphasis supplied.)

It may be noted that exception was taken to this instruction by Ellerman.

In summary, we are of the opinion that the testimony adduced afforded ample basis (as Atlantic itself says) for a jury finding that the discharge of the Philadelphia bales was carried on in an unsafe place to work and while that finding made Ellerman liable to Beard it also made Atlantic liable, as a matter of law, to Ellerman for indemnity for its breach of warranty as previously detailed.

The opinion stated makes it unnecessary for us to consider the issue of unseaworthiness[8] which was premised on Beard's view that the doctrine of unseaworthiness ex- [fol. 231] tends to the packaging of the ship's cargo;[9] and

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[8] Hudgins v. Gregory, 219 F.2d 255 (4 Cir. 1955).

[9] It may be noted that plaintiff relies in this respect on the holding of the Second Circuit in Reddick v. McAllister Lighterage

that the cargo in the instant case was "unseaworthy" by reason of the "inadequacy" of the steel bands used to bind the burlap bales.

For the reasons stated the judgment of the District Court in favor of the plaintiff Leighton Beard and against the defendants, Ellerman Lines, Ltd. and The City Line, Ltd. will be affirmed, and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. will be reversed, and the cause remanded with directions to the District Court to proceed in accordance with this opinion.

Co., 258 F.2d 297 (1958), cert. den. 358 U.S. 908 where it was said (p. 299):

". . . the holding of unseaworthiness may also be predicated on the latent defect in the cargo crate". But see Carabellese v. Naviera Asmar, S.A., 285 F.2d 355 (1960) where the Second Circuit limited *Reddick* to its particular facts and said it was "not disposed" to extend the doctrine of unseaworthiness to include "cargo safe to handle".

[fol. 232] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,278

LEIGHTON BEARD

vs.

ELLERMAN LINES, LTD., and THE CITY LINE, LTD.,
Appellants,

vs.

ATLANTIC & GULF STEVEDORES, INC.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: McLaughlin, Kalodner and Hastie, Circuit Judges.

JUDGMENT—April 7, 1961

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of the plaintiff Leighton Beard and against the defendants Ellerman Lines, Ltd. and The City Line, Ltd., be and the same is hereby affirmed, with costs; and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. be, and the same is hereby reversed, with costs; and the cause remanded with directions to proceed in accordance with the opinion of this Court.

April 7, 1961

[fol. 233] [File endorsement omitted]

In United States Court of Appeals

For the Third Circuit

No. 13,278

Leighton Beard

v.

Ellerman Lines, Ltd. and The City Line, Ltd.

v.

Atlantic and Gulf Stevedores, Inc.

Order Denying Petition for Rehearing—May 31, 1961

Present: McLaughlin, Kalodner and Hastie, Circuit Judges.

After due consideration the petitions for rehearing in the above-entitled case are hereby denied.

By the Court

Kalodner, Circuit Judge.

Dated: May 31, 1961

[fol. 234] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 235]

SUPREME COURT OF THE UNITED STATES

No. 282—October Term, 1961

ATLANTIC AND GULF STEVEDORES, INC., Petitioner,

vs.

ELLERMAN LINES, LTD., ET AL.

ORDER ALLOWING CERTIORARI—October 16, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 282

LEIGHTON BEARD,
Respondent,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE LTD.,
Respondents,

v.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. .

LEIGHTON BEARD,

Respondent,

v.

ELLERMAN LINES, LTD., AND
THE CITY LINE, LTD.,

Respondents,

v.

ATLANTIC AND GULF STEVEDORES, INC.

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, *The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner, Atlantic and Gulf Stevedores, Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on April 7, 1961, reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania, and the appeal docketed in the said Court of Appeals as No. 13,278, and the order of the said Court denying rehearing entered on May 31, 1961.

OPINION OF THE COURTS BELOW.

The District Court did not file an opinion. The opinion of the Court of Appeals for the Third Circuit is recorded in 289 F. 2d 201 (*infra*, p. 3a). The Court of Appeals for the Third Circuit did not file an opinion denying the petition for hearing of Atlantic and Gulf Stevedores, Inc.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1961 (*infra*, p. 20a). The Order denying the Petition for rehearing was entered on May 31, 1961 (*infra*, p. 18a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. C. Constitution Amendment VII—Civil Trials.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

QUESTIONS PRESENTED.

No. 1. In a suit by a shipowner claiming indemnity from a stevedoring contractor is not the reversal of a judgment founded on a special verdict of the jury that a stevedoring contractor was not negligent or in breach of its contractual obligations, there being no rule of law making such finding by the jury improper, a re-examination of facts tried by a Jury otherwise than according to the rules of the Common Law and as such a violation of the Seventh Amendment of the Constitution of the United States?

No. 2. Where a shipowner and a stevedoring contractor enter into a written contract which expressly defines the obligation of each, and a Jury's special verdict acquits the stevedore of any failure to do its work in accordance with the contractual obligation is it not error for an Appellate Court to set aside the factual finding of the Jury and reverse a judgment entered upon such verdict on the ground that the stevedore, as a matter of law, breached its warranty to perform the obligations of the contract with reasonable safety?

No. 3. Where the verdict of a jury is based upon substantial and competent evidence, and the Trial Court's charge encompassed all of the issues raised by the pleadings, proofs and the contractual obligations of the parties, may the Court of Appeals reverse such verdict without a holding or showing that the special verdict of the jury is clearly erroneous?

STATEMENT OF THE CASE.

Leighton Beard, resident and citizen of Pennsylvania, brought this civil action, founded upon the diversity jurisdiction of the District Court against Ellerman Lines, Ltd. and The City Line, Ltd., British corporations, hereinafter referred to as "Ellerman", to recover damages for serious injuries sustained in the course of discharging bales of burlap from the latter's vessel, S. S. "City of Calcutta". The accident occurred July 1, 1955. Beard, a longshoreman, was employed by Atlantic & Gulf Stevedores, Inc., hereinafter referred to as "Atlantic", a concern engaged in stevedoring services for Ellerman.

Beard's complaint against Ellerman alleged that the latter's vessel was unseaworthy and that Ellerman was negligent. Ellerman impleaded Atlantic as a third-party defendant alleging that Beard's injuries resulted from Atlantic's failure to properly perform the work of unloading

the cargo, using a negligent manner to unload the cargo, using devices that were dangerous, improper and in violation of its agreement with Ellerman (11a, Appellant's Appendix). Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The undisputed facts indicate that the bales of burlap had been loaded in India. The bales in question weighed approximately eleven hundred pounds, measuring two feet by three feet by four feet and were stowed in the lower 'tween deck of the number one hatch of the Ellerman vessel, the "S. S. City of Calcutta". Atlantic played no part in the loading or stowage of this cargo.

There were sixty-three tons of New York bales in the forward end of the hold extending out halfway into the square of the hatch, adjoining one hundred tons of Philadelphia bales of burlap stowed to an equal height and extending to the after end of the hold. Though the vessel arrived from New York, no evidence was offered to explain why the New York bales had not been discharged. The bales were tightly bound by four parallel one-inch bands, each bale containing thirty to forty bolts of burlap and were tightly stowed in layers on tiers.

The discharging operation consisted of pulling the bales from their tightly stowed position to the square of the hatch by winches and raising them vertically out of the vessel and on to the pier. This was accomplished by use of a ring to which six equal length ropes were attached. A large flat-end hook on the end of each rope was inserted under the metal bands which compressed the bales, using two hooks per bale. Three bales were thus raised together. Beard and his fellow longshoremen would then signal the winch operator to pull the bales from their stow to the hatch square, and after overcoming side-sway, the bales would be raised vertically. The holdmen would then seek shelter away from the square of the hatch protected by the coaming. After about three hours of such operation, two tiers of the Philadelphia bales had been removed. As a draft of three bales was being lifted out of the hatch to a

height of approximately thirty feet, in a vertical lift, the two bands of one bale broke, causing the bale to fall. It struck the New York cargo and bounded in the direction of Beard, pinning him against the after bulkhead and causing injuries which necessitated the amputation of his right leg above the knee. No other bales were known to have fallen while being lifted vertically prior to the accident in question or during the years of experience of any of the witnesses or experts who testified in the case.

The case was tried before the Honorable Chief Judge J. Cullen Ganey and a jury. After ten days of trial the issues were presented to the jury upon five interrogatories, phrased after much discussion in a form agreed upon by counsel (185b-215b). After deliberation, the jury returned with the following answers to interrogatories (187a-189a):

1. Was unseaworthiness a substantial factor in causing the injuries to the Plaintiff?
   Yes.
2. Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the Plaintiff?
   Yes.
3. In what amount, if any, did you assess the damages to be awarded the Plaintiff?
   $100,000.00.
4. If you have answered "yes" to interrogatories 1 or 2 did the fault of Ellerman Lines, Ltd., and the City Line, Ltd. arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation?
   No.
5. If you have answered "yes" to interrogatory No. 4, was Atlantic and Gulf Stevedores, Inc.'s breach of this contract a substantial factor in bringing about the injuries to the Plaintiff?
   No.

The District Court entered judgment on the special findings of the jury in favor of Beard against Ellerman and in favor of Atlantic upon Ellerman's claim for indemnity. Ellerman's motions for judgment n.o.v. or for a new trial, were denied on April 4, 1960 without opinion and Ellerman appealed to the Court of Appeals for the Third Circuit. On April 7, 1961 the Court of Appeals for the Third Circuit affirmed the judgment in favor of Beard and against Ellerman, but reversed the finding of the jury and the judgment in favor of Atlantic upon the reasoning that if the jury based its finding of negligence against Ellerman for improperly stowing the New York cargo adjoining the Philadelphia cargo thus creating an unsafe place to work, it was equally negligent for Atlantic to handle the cargo. The Court erroneously found that the District Court had limited the sole criterion of the jury's test as to whether Atlantic had breached its contract of workmanlike service, to the use of the bale hook method alone and, without regard to whether the discharge operation was conducted in an unsafe place. The charge demonstrates that the District Court did not so limit the jury's test (171a, 172a, 173a, Appellant's Appendix).

The Court of Appeals found as a matter of law that Atlantic was liable to Ellerman for indemnity for breach of its warranty to perform the obligations of the contract with reasonable safety. The issue of unseaworthiness was not considered by the Court.

Petitioner moved for rehearing upon the grounds that the weight of the evidence supported the jury's verdict,[1] that no evidence was presented to support the conclusion that Atlantic was negligent as a matter of law, that the action of the Court was in violation of the Seventh Amend-

1. The witnesses and all of the experts described Atlantic's unloading operations, methods and procedures as follows:

"safe method of unloading this cargo" (59b); "unusual and customary" and as a "safe method" (123b); "perfectly safe for unloading bales which weigh 1,000 to approximately 1,400 pounds" (160b); Ellerman's expert described the methods and procedures as the "safest customary method" (83b, 85b).

ment to the Constitution and that the Court erred in holding Atlantic liable as a matter of law notwithstanding that the jury found no breach of Atlantic's written contract. Petitioner further contended that the Court erred in concluding that the District Court failed to submit to the jury the issue of "unsafe place to work" since the instructions to the jury encompassed all of the issues raised in the pleadings, during the trial and the terms of the contract which was offered in evidence.

The Court of Appeals denied the Petition for a rehearing without opinion.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

First Point: The Decision of the Court Below Reversing a Judgment Entered Upon the Unanimous Verdict of a Jury Violates the Provisions of the Seventh Amendment to the Constitution of the United States Which Provides That "No Fact Tried by a Jury, Shall Be Otherwise Re-Examined in Any Court of the United States, Than According to the Rules of the Common Law," There Being No Rule of Law Making Such a Finding by the Jury Improper.

The decision of the Court of Appeals in the instant case reversing the unanimous verdict of impartial jurors was a capricious and unreasonable action directly contrary to the provisions of the Seventh Amendment to the Constitution of the United States. The decision marks another step in the gradual erosion which has unfortunately worn away part of the essential guarantee of the Seventh Amendment.

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (Emphasis added.)

The amendment has for its primary purpose the preservation of "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under appropriate instructions of the Court": *Baltimore & C. Line v. Redman*, 295 U. S. 654, 657 (1935); *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U. S. 494, 497-499 (1931); *Dimick v. Scheidt*, 293 U. S. 474, 476, 485-86 (1935).

The aim of the amendment to preserve the historic line separating the province of the jury from that of the judge, still permitted procedural improvements which did not transgress this line. (See Constitution of United States, Revised and Annotated 1952 Senate Document No. 170 82nd Congress 2nd Session p. 895 for illustrations of this development.)

The only modes known to the common law to re-examine such facts as are properly tried by a jury are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings: *Parsons v. Bedford*, 3 Pet. 447, 7 L. Ed. 732.

Prior to the enactment of Rule of Civil Procedure 50, 28 U. S. C. A. federal courts did not have the right even where the evidence was insufficient as a matter of law to do anything more than grant a new trial. Rule 50(b) was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It merely renders unnecessary a request for reservation of the question of law or a formal reservation and in addition it regulates the time and

manner of moving for direction and of moving for judgment on the basis of the refusal to direct. "It adds nothing of substance to rights of litigants heretofore existing through a more cumbersome procedure: *Montgomery Ward v. Duncan*, 311 U. S. 250; *Berry v. United States*, 312 U. S. 450. In the latter case (312 U. S. p. 453) this Court said:

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact a jury being the constitutional tribunal provided for trying facts in courts of law."

A trial court may not now and has never had the right pursuant to the Constitution of the United States to *predetermine* an essential fact. An appellate court may not now and has never had the right to *redetermine* a fact properly submitted and found by the jury which is sustainable by the testimony *and substitute its own conclusion or finding of fact.* Such a procedure clearly denies the party a trial by jury guaranteed by the Seventh Amendment and violates the interdict of the last part of the amendment which requires that no fact be re-examined once found by a jury except in accordance with the common law: *U. S. v. Alfred Manuszak*, 234 F. 2d 421; *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350; *Liberty Mutual Insurance Company v. Thompson*, 171 F. 2d 723 (C. C. A. 5th 1948); *Curtis v. A. Garcia Y Cia*, 272 F. 2d 235, 238 (C. C. A. 3rd 1959).

In our case, the Court of Appeals was wholly indifferent to the established basis upon which powers have been allocated between the court or jury and was beguiled into rejection of a view of the facts which seemed to it less reasonable than its own view, a violation of Petitioner's constitutional rights, which cannot be condoned.

In submitting the issues to the jury the District Court Judge under clear and proper instructions let the jury decide whether or not there was an unreasonable discharge

of this cargo, an unsafe method used in the discharge thereof and asked it to relate its findings to the special interrogatory No. 4 which asked it to state whether the fault of Ellerman arose out of any failure on the part of the Petitioner to do its work in accordance with the contractual obligations between it and the shipowner. The jury answered this latter interrogatory (187a, 189a) in the negative having first stated in response to interrogatories Nos. 1 and 2 respectively that unseaworthiness was a substantial factor in causing the injuries to the plaintiff and that negligence on the part of Ellerman was a substantial factor in causing injuries to the plaintiff (188a). Despite these clear factual findings the Court of Appeals found (289 F. 2d 201, 207): "Thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in the unsafe place to work." The jury had made a completely contrary factual finding and even if its finding in the Court's view was erroneous under the facts, there being sufficient evidence to sustain its finding, the Court could not *substitute* its own finding in order to reverse.

It is submitted that to justify a reversal and a direction to find against Petitioner there would first have to be an insufficiency of testimony to support the specific finding of the jury or a basic error of law as to how its finding once made should be applied.

The Court of Appeals had itself noted the distinction between the jury's answer to interrogatory No. 2 (in which it held Ellerman negligent) and its answer to interrogatory No. 4 (in which Petitioner was absolved from liability over to Ellerman) by saying (289 F. 2d 201, 206):

> "In determining Interrogatory No. 2 the jury was determining *the issue of negligence* between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the *contractual obligation* of Atlantic to Ellerman."

If indeed, as the court later suggests, the jury was *obliged as a matter of law* to find Petitioner negligent if it found Ellerman negligent, then the findings of the jury were inconsistent as the Appellant below argued, and since the findings were for the jury, the judgment against the shipowner should have been reversed and the case returned for a new trial.

The fact is however that while Ellerman was liable to Beard for negligence, the Petitioner was not liable to Beard for anything it did, so long as it met its absolute obligations to Beard under the Longshoremen's and Harbor Workers' Act (33 U. S. C. Sec. 901 et seq.).

Petitioner's contractual liability to Ellerman for indemnity involved a consideration of the terms of the contract: *Weyerhaeuser SS Co. v. Nacirema Co.*, 355 U. S. 563. The contract and its terms however were neither examined, reviewed nor construed by the Court of Appeals.

Disregarding completely its obligation to accept the jury's findings where sustainable by the evidence, as such findings related to the question of breach of the contract, the Court of Appeals merely equated the negligence of Ellerman as determined by its duty to Beard with the obligations owing by Petitioner to Ellerman solely by reason of the written contract, and held Petitioner liable to Ellerman for the *same* negligence which made Ellerman liable to Beard, the plaintiff.

The Court of Appeals points out that "the record affords ample basis for a jury fact finding that (1) use of the bale hook method in the discharge of burlap bales constituted negligence and (2) that the injured longshoreman was not afforded a safe place to work."

But despite the fact that the record afforded a basis for such findings, *these findings were not made as to the Petitioner*, although the charge of the court left to the jury "whether there was a sub-standard performance in which there was foreseeability that injury might occur to someone in the breach of that contract . . ."

The District Court specifically posed to the jury the questions (172a):

> "Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and the City Line responsible to the plaintiff? . . . Did they breach that contract to do it in a workmanlike manner with the *utmost* care? . . . In other words did the liability of the Ellerman Lines Limited and the City Line Limited arise out *of any* failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?" (Emphasis supplied.)

The jury said "no" to all of these questions by its answer to interrogatory No. 4.

As was well stated by Mr. Justice Lamar in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. . . . *The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court.* . . . When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, *the determination of the matter is for the jury.* It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question is ever considered as one of law for the court." (Emphasis supplied.)

The courts are constantly urged in cases of this character to substitute their judgment for that of the jury on questions of fact. The seductive argument is made that a conclusion of fact which appears by the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it

means that the courts are substituting their judgment for that of the jury on fact questions in violation of constitutional requirements: *Burcham v. J. P. Stevens Co.*, 209 F. 2d 35.

Questions of negligence or contributory negligence are not to be decided by applying "rules of thumb" to the evidentiary facts and treating as conclusions of law what are in reality conclusions of fact: *Baltimore & Ohio R. R. Co. v. Griffith*, 159 U. S. 603, 611, 16 S. Ct. 105, 40 L. Ed. 274; *Texas & Pac. R. Co. v. Gentry*, 163 U. S. 353, 368, 16 S. Ct. 1104, 41 L. Ed. 186.

In *The Texas Company v. Gianfala*, 350 U. S. 879, 100 L. Ed. 775, the Court of Appeals had deliberately set aside the jury's verdict as to whether the plaintiff's decedent was a seaman and "member of the crew" under the Jones Act. This Court granted certiorari and without argument summarily reversed the judgment of the Court of Appeals, with directions to reinstate the judgment of the District Court for the plaintiff on the ground that the issue was exclusively for the jury. It is respectfully submitted that summary reversal is fully warranted in the instant case.

The question in the instant case, whether the Petitioner had complied with its contractual obligation that "*All the work shall be done with every care and due dispatch to the satisfaction of the party of the first part.* (shipowner)" (148a) was clearly a factual question for the jury.

Most recently in *Sentilles v. Inter-Carribean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. (2) 142, 80 S. Ct. 173, Mr. Justice Brennan delivering the opinion of the Court in a case involving a factual determination by a jury under the Jones Act, stated that:

> "*The members of the jury, not the medical witnesses were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration.* . . . . The focal point of judicial review is the reasonableness of the particular refer-

> ence or conclusion drawn by the jury . . . The very essence of its (the jury's) function is to select from among conflicting references and conclusions that which it considers most reasonable . . . *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different references or conclusions or because judges feel that other results are more reasonable.* Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 NCCA U. S. 647. See Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 1 L. Ed. (2) 493, 77 S. Ct. 443." (Emphasis supplied.)

In the instant case, the finding of negligence by the jury as to the defendant shipowner did not require *as a matter of law* a corrolary finding that the stevedore was also negligent. The facts in evidence justified a contrary finding and the Court of Appeals could not reverse it by suggesting that it was required as a matter of law.

In *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where as here there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable:"

See also *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353; *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. Ed. 490.

Indeed in two cases dealing essentially with the issues involved in this case, the Court of Appeals for the Third

Circuit has met the issue in conformity with the requirements of the Seventh Amendment. Most recently in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional* (decided July 6, 1961 by Circuit Judges Kalodner, Staley and Hastie (two of whom were members of the court which decided our case)) the jury in answer to a special interrogatory, found that the shipowner was not guilty of negligence but based upon a finding of unseaworthiness, made an award in favor of Hodgson against it. The shipowner argued on appeal that judgment rendered against it in the third party proceedings for indemnity, must be reversed as a matter of law despite a jury finding that the stevedoring company had performed its services in a "workmanlike, safe and proper manner". The Court of Appeals said:

> "The shipowner forgets that an appellate court will not interfere with a judgment entered on a verdict returned by a jury simply because of its opinion as to the weight or preponderance of the evidence. Liberty Mutual Insurance Co. v. Thompson, 171 F. (2d) 723 (C. A. 5 1948); Harnick v. Lilley, 167 F. (2d) 159 (C. A. 8 1948); 5 Moore's Federal Practice Sec. 38.08 (5 p. 89)."

In the latter decision the Court referred to its own decision in *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (1956) where, in an opinion written by Judge Kalodner, the court felt bound by the jury's finding and specifically referred to *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, saying:

> "Whether the stevedoring company's conduct constituted a breach of the provision (of the agreement) was, of course, a question of fact for the jury. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., supra."

In the instant case there was ample evidence to support the jury's verdict. All of the witnesses were unanimous in their testimony that Atlantic's methods were the

only methods they had seen used in discharging such cargo (82b, 83b); they had never seen bands break during a vertical lift (7b, 14b, 38b). The method is approved by the Safety Rules of the Philadelphia Marine Trade Association.

The four experts all agreed that the methods and procedures used by Atlantic were more safe and efficient than any other possible method (see Footnote 1, p. 6). No evidence was offered to show that Petitioner, even if charged with the duty could have done anything to correct the condition created by the New York cargo.

The jury was thus justified in finding that the fault of the shipowner did not "arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation" (188a).

The Appellate Court must resolve all conflicts in the evidence in favor of the party against whom the judgment is sought and reject any evidence to the contrary. *Downing v. Union Paving Co.*, 184 F. 2d 481 (C. C. A. 3rd 1949); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944), rehearing denied 321 U. S. 802; *Sentilles v. Inter Caribbean Shipping Corp.*, 80 S. Ct. 173, 361 U. S. 107 (1959).

The specific holdings in *Hagens* and *Hodgson*, referred to above, make the action of the Court of Appeals in this case the more startling. There is no explanation for the court's lapse in denying Petitioner its constitutional rights in our case and it cannot be justified. That the decision clearly violates the provisions of the Seventh Amendment relating to review on appeal is beyond question. There is no doubt that the application of the standard of appellate review expressed by this Honorable Court in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6 has been disregarded by the Court of Appeals. In the *McAllister* case the court said (U. S. PP. 20-21, L. Ed. p. 24):

> "In relation to the District Court's findings we stand in review in the same position as the Court of

Appeals. The question therefore, is whether the findings of the District Court are *clearly erroneous.*" (Emphasis supplied.)

Applying this standard to the present case the Court of Appeals could reverse the judgment in favor of Atlantic only if the jury's findings were clearly erroneous. The record demonstrates that the findings of the jury were *not* "clearly erroneous" and the Court of Appeals erred in reversing them in violation of the provisions of the Seventh Amendment. Upon this ground alone, certiorari should be granted and the decision of the court below reversed.

Second Point: The Decision of the Court Below Is in Conflict With the Rule Laid Down in the Decisions of the Supreme Court in American Stevedores, Inc. v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847, and Weyerhaeuser Steamship Co. v. Nacirema, 355 U. S. 563, 2 L. Ed. 491, 73 S. Ct. 438 (1958) Which Hold That in the Presence of a Written Contract All Fact Issues Involved in the Third Party Action, Including the Intention of the Parties to Such Writing, the Extent, Scope and Application of the Contractual Obligations Between the Shipowner and Stevedore, and Whether They Were Breached Are Issues to Be Decided by the Jury.

The decision of the Court below in the instant case is directly in conflict with the decisions of this Court in *American Stevedores, Inc. v. Porello,* 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847 and *Weyerhaeuser Steamship Co. v. Nacirema,* 355 U. S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958).

There has been a considerable disagreement among other Courts about this Court's holdings in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099, 66 S. Ct. 872;

Halcyon Lines v. Haenn Shipceiling & Refitting Corp., 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277; ***Pope & Talbot, Inc. v. Hawn***, 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202; ***Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.***, 350 U. S. 141; ***Weyerhaeuser Steamship Co. v. Nacirema Steamship Co.***, 355 U. S. 563 (1958); and ***Crumady v. Joachim Hendrik Fisser***, 358 U. S. 423.

The active area of litigation involving suits for indemnity and so-called "contribution" by vessel owners against independent stevedoring contractors set the stage for this group of decisions by this Court extending the warranty of seaworthiness to a class of workers which had consistently been regarded as strangers to the rigors inherent in the work of those who went down to the sea in ships. Thus in 1946, in *Seas Shipping Company v. Sieracki*, (*supra*) the Supreme Court of the United States initiated this unprecedented course by holding that longshoremen were entitled to the warranty of seaworthiness. In *Halcyon Lines v. Haenn Shipceiling & Refitting Corp.*, (*supra*) (1952) this Court determined that the vessel could not seek contribution from an independent stevedoring contractor as an avenue to insulate its new and judicially acquired exposure. In *Pope & Talbot, Inc. v. Hawn*, (*supra*) (1953) this Court further extended the warranty of seaworthiness to cover a carpenter who was temporarily working aboard ship.

In 1956, this Court developed relief for the vessel by way of indemnity in the landmark decision of *Ryan Stevedoring Company v. Pan Atlantic Steamship Corp.*, (*supra*) wherein this Court held that the provisions of Section 5 of the Longshoremen's and Harborworkers' Compensation Act, 33 U. S. C. 905, did not act as a bar to the shipowner's asserted right to recover indemnity. The rationale behind the Court's holding on this point can best be summarized in these words from the opinion:

> "While the compensation act protects a stevedoring contractor from actions brought against it by its em-

ployee on account of the contractor's tortious conduct causing injury to the employee the contractor had no logical ground for relief from the full consequences of its *independent contractual obligation, voluntarily assumed to the shipowner to load the cargo properly. . . .*"

". . . The shipowners action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employees. *The Third-Party Complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner.* Accordingly, the shipowner's action for indemnity on that basis is not barred by the compensation act". (Emphasis supplied.) (350 U. S. 131, 100 L. Ed. 140, 76 S. Ct. 239.)

The Court then reached the second question which it viewed as whether, *in the absence of an express agreement of indemnity* (there being no formal written contract) a stevedoring contractor was obligated to reimburse a shipowner *for damage caused by the contractor's improper stowage of the cargo.* The Court clearly indicated that the decision would be based on contractual principles and expressly refused to meet the question on common law indemnity principles:

"Because respondent in the instant case relies entirely upon Petitioners contractual obligation, we do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The Court reasoned that Ryan having agreed to perform *all* of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded, of necessity agreed to stow the cargo properly and safely and

that failure to do so was in effect a violation of the very essence of the stevedoring contract. The Court stated that the stevedore owed to the shipowners a *"warranty of workmanlike service"* which the Court compared to a manufacturer's warranty of soundness of its manufactured product. The Court rejected the theory that the shipowner's duty to supervise the stowage and right to reject unsafe stowage, would preclude it from recovering indemnity. There is nothing in the opinion of any Court considering the *Ryan* case to indicate that it was ever urged or proved that the vessel had *actual knowledge* of the condition resulting in injury to the longshoreman. Instead the Courts considering the *Ryan* case viewed the fault of the vessel as arising from the fact that the vessel *failed to discover and should have known of the improper stowage. Clearly in Ryan the vessel owner had no actual knowledge of the defects and its failure was merely one to inspect and discover the defect.*

This Court again considered the indemnity question in *Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*, (*supra*). In that case, a winch shelter built in New York by the stevedore was permitted to remain while the ship proceeded to and arrived at Boston. There, the shelter was not inspected by either the stevedore or the ship's crew until the injury which occurred some five days after the arrival of the vessel in Boston. The case was tried to a jury with the judge *reserving submission* of the third-party action until he received the verdict on the main suit. The jury was charged as to both seaworthiness and negligence and returned a verdict in favor of the Plaintiff on the negligence cause of action *and in favor of* the vessel on the unseaworthiness count (236 F. 2d 849). After receiving the verdict for the Plaintiff in the main case, *the trial court directed a verdict in favor of the stevedoring contractor against the vessel on the indemnity action.* The Court of Appeals affirmed the directed verdict. The Supreme Court of the United States in a unanimous opinion

reversed the Second Circuit and remanded the case for a new trial, holding that it was error for the trial court to direct a verdict in favor of the steyedore *and that the issues relating to indemnity should have been submitted to the jury.* The Court goes on to enunciate a principle, without clarification, that may well be the critical factor in indemnity actions (355 U. S. 567, 2 L. Ed. 2d 494, 78 S. Ct. 442):

> "If in that regard respondent rendered a substandard performance which lead to foreseeable liability of petitioner (the vessel) the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Emphasis added.)

The Court gave no indication of just what conduct on the part of the vessel would be necessary to preclude recovery of indemnity against the stevedore, but indicated clearly that the test of liability in the indemnity action rests on *different* principles than the liability of the vessel to the Plaintiff in the main case. It reiterated in a footnote (2 L. Ed. 2d 282) the admonition of the *Ryan* case that (350 U. S. at 134): "the shipowner's action is not changed from one for a breach of contract to one for tort simply because recovery may turn upon the standard of performance of petitioner's stevedoring service", and stated (355 U. S. 567-568, 2 L. Ed. 2d 494-495, 78 S. Ct. 442, 443):

> "The evidence bearing on these issues (the indemnity issues)—Petitioner's action in making the shelter on its ship available to respondent's employees in Boston, although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instructions. These issues were not encompassed by the instructions in the main case, where the test of Petitioner's liability was based on failure to perform a non-delegable duty to Connolley. Since the liability of respondent depended on different

principles, Crawford v. Pope & Talbot, Inc., (C. A. 3 Pa.) 206 F. 2d 784, 792, all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case."

Recognizing that the jury verdict in the main case might have been predicated on one of at least three different grounds the Court concluded that at least one of these reasons, i.e., the failure on the part of the vessel during the five days in Boston to inspect the shelter and to detect and correct the unsafe condition would not preclude a recovery of indemnity by the vessel.

On February 24, 1959, this Court decided *Crumady v. Fisser*, (*supra*). The accident occurred there while cargo was being removed from cargo hatches by means of the ship's cargo gear. While raising a draft of cargo a topping-lift parted, permitting a cargo boom and its attachments to fall into the hatch, striking and injuring the Plaintiff. The safe working load of the boom and topping-lift at the time of the accident was three tons. A shut-off device on the boom had been set at six tons by employees of the ship before being turned over to the longshoreman. The trial court held the vessel unseaworthy and liable to the injured longshoreman. The trial court found that the stevedores had shifted the boom in an effort to gain more clearance between the cargo and sides of the hatch, creating a load in excess of the safe working load. It held the stevedoring contractor liable for indemnity (142 F. Supp. 389) because it was negligent in bringing into play the unseaworthy condition of the vessel and that such negligence was the sole cause of the injury.

The Court of Appeals for the Third Circuit reversed on the basis that the vessel was not unseaworthy and that the sole cause of the injury was the negligence of the stevedoring contractor. This Court reversed the Third Circuit, and held that the shipowner was not relieved of his duty to supply a seaworthy vessel by turning control of the loading or unloading of the ship over to the stevedoring con-

pany. The Court based its opinion on the fact that the shut-off device was adjusted by the ship's crew so as to make it unsafe and dangerous for the work at hand. This Court, however, felt that the shipowner was entitled to indemnity under the principle announced in the *Ryan* and *Weyerhaeuser* cases. The Court concluded the District Court's finding that *the negligence of the stevedoring contractor* brought the unseaworthiness of the vessel into play and amounted to a breach of warranty of workmanlike service, was not clearly erroneous.

The *Crumady* case still did not undertake a definitive statement of the "conduct on the part of the shipowner" which will bar indemnity. It merely indicated that furnishing defective equipment will not necessarily have that effect.

Thus Courts attempting to apply *Weyerhaeuser* and *Crumady* have real difficulty in determining what conduct of the shipowner will bar indemnity *and are relegated to making comparisons to the actions of the owners in Crumady and Weyerhaeuser resulting in abstract and conjectural conclusions:* See *Calmar Steamship Co. v. Nacirema Operating Co.*, (4th Cir.) (1959), 266 F. 2d 79, 80, 81; *American Export Lines v. Revel*, (4th Cir.) (1959) 266 F. 2d 82.

In the latter case the Court said: "We do not attempt to explore what conduct, in other circumstances, would be 'sufficient to preclude recovery'. We merely hold that under the decisions of the Supreme Court the limits are not transcended here."

What are the limits? What is the conduct which will bar recovery by way of indemnity? Will any conduct of shipowner bar recovery in the case of the existence of a contract of indemnity? These questions remain unanswered by this Court, because their determination are matters of fact in each case, which *Weyerhaeuser* and *Porello* clearly hold should be submitted to a jury, and are not a matter of law as the Court of Appeals erroneously held in the instant case. It is only where a jury or the fact-finder, as in

Crumady, find negligence of the stevedore amounting to a breach of contract that a court can say that the obligation to indemnify as a matter of law exists.

In *Waterman S. S. Corp. v. Dugan & McNamara*, 5 L. Ed. 2d 169 (1960) the stevedore alleged as an affirmative defense that there had been no direct contractual relationship between it and the petitioner covering the stevedoring services. This Court held that although *Ryan* and *Weyerhaeuser* placed considerable emphasis on the direct contractual relationship between the shipowner and the stevedore, *Crumady* made it clear that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper *performance* of the stevedoring services, was unaffected by the fact that contractual privity was lacking and that merely going aboard a vessel to perform stevedoring services was enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries.

Certiorari was granted in the *Waterman* case "to consider whether in a situation such as this the *absence* of a contractual relationship between the parties is fatal to the indemnity claim" (5 L. Ed. 2d 171).

Certiorari should be granted in the instant case to consider whether in the *presence* of a written contract between shipowner and stevedore containing limited provisions for indemnity and expressly limiting the performance of the stevedore to fixed written standards and obligations which a jury expressly found were performed, a Court may nevertheless impose the burden of indemnity solely on an implied warranty of workmanlike service referred to in *Ryan, despite a well-founded specific finding of fact that no act of the stevedore was in breach of the written contract between the parties.*

This specific question has never been considered by the Supreme Court of the United States.

Of all the cases heretofore referred to however only *Weyerhaeuser*, (*supra*) and *American Stevedores v. Porello*,

(*supra*) in the Supreme Court dealt with *the manner in which a specific written contract* relating to the indemnity obligation should be considered by the Court. In each of these cases the specific factual issue here involved was not encountered. But it is significant that in each case the Court held that the extent of the indemnity obligation assumed by the contract, when raised, and whether it applied to the specific facts leading to injury, when raised, were issues of fact and that all fact issues should have been submitted to the jury (2 L. Ed. 2d 494).

The *Porello* case was more analytical than the *Weyerhaeuser* case. Faced with a specific written contractual provision relating to indemnity, which at first reading appears to be clear, it nevertheless held that the clause was ambiguous and required evidence to be taken as to the intention of the parties so that the issue could be resolved *as a question of fact* and said:

> "On this record we cannot answer the contention of either party. As it stands the clause is ambiguous. Evidence might well have been taken as to the intention of the parties, but was not. It may be that the parties only meant American to indemnify the United States should the Government be held liable for damages solely caused by American's negligence. It may be that American should fully reimburse the United States for all damages caused in any part by American's negligence. Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault. . . . From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that Court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court inter-

prets the contract not to apply to the facts of this case, the Court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law."

The case was remanded for determination of the meaning of the contract.

Contrary to the requirement of these two cases that the terms of the contract be adverted to and the intention ascertained, the Court of Appeals in the instant case wholly disregarded the terms of the contract and the fact that there was a writing in which the parties had solemnly fixed their rights. It relied instead on the implied contract theory of *Ryan*, *Crumady* and *Waterman* in which there were either admittedly no written contracts relating to indemnity involved or the specific terms of the contract were not adverted to or considered by this Court and although in each of those cases there was a specific factual finding of negligence amounting to a breach of the warranty of workmanlike service. The Court of Appeals in the instant case also relied upon *American President Lines v. Marine Terminal Corp.*, 334 F. 2d 753, but in that case the specific terms of the contract were adverted to and considered and they were found as a fact to have been breached by the jury.

In the *Porello* case this Court held that the interpretation of the indemnity provision of the contract[2] was to be left in the first instance to trier of the facts having the benefit of whatever evidence existed as to the intention of the parties. There being no evidence as to the intention of the parties in the record, the Court reversed the award of indemnity and remanded the case to the District Court

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2. "The stevedore performing any service under this schedule shall be responsible for any and all damages or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, cars, and car-floats used in connection therewith, through the negligence or fault of the stevedore, his employees and servants."

for a determination of the meaning of the contract. This action stressed the care with which the intention of the parties as expressed in their contract must be analyzed. In the *Weyerhaeuser* case, *supra*, the action of the trial Court in *directing* a verdict in favor of the stevedore contractor was held to be improper. The evidence as to whether the stevedore rendered a substandard performance of its contractual obligation was held to be for the jury's consideration under appropriate instructions. Such a procedure was imperative since the exact basis upon which the shipowner's negligence was found by the jury was uncertain. Whether the right to indemnity exists would most naturally be determined by the jury, which, in the first instance knew precisely upon which of several theories the shipowner's liability was grounded. As in *Weyerhaeuser* where at least three possible bases of liability were apparent and one at least would not preclude indemnity, the jury determination would thus decide whether the theory applied by it warranted a finding of a breach of contract and whether indemnity would follow.

The Court of Appeals Reversed the Findings of the Jury and the Judgment Entered Thereon Upon the Erroneous Conclusion That the Trial Judge Failed to Submit to the Jury the Question of Unsafe Place to Work in Determining Whether Petitioner Breached Its Contractual Obligation.

The Court of Appeals in the instant case disregards the mandate of *Porello* and *Weyerhaeuser*. It gives no consideration and makes no reference to the contract between the parties and ignores the fact that the jury's finding specifically exculpated petitioner of any breach of its contractual obligation, or of any negligence in "handling" cargo in an unsafe place after fully considering the con-

tract under a full and appropriate charge of the trial judge (171a, 172a, 173a Appellant's Appendix).[3]

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3. I must so instruct you because I have to go to the second cause of action, which is the action by Ellerman Company against Atlantic & Gulf Stevedores. This action arises out of contract. Ellerman Lines *had a contract with the Atlantic & Gulf Stevedores, and that contract is before you, and you will read it and see just what the Atlantic & Gulf Stevedores contracted to do.*

Under one portion of that contract they were supposed to unload and discharge this cargo of burlap with the utmost care. *There are other portions of the contract that you may advert to; the whole contract is in evidence.* In this action by Ellerman Lines and The City Line against Atlantic & Gulf Stevedores whom the defendants brought in, the focal point of your inquiry is *whether there was any breach of that contract,* whether there was a substandard performance in which there was foreseeability that injury might occur to someone in the breach of that contract, and while there is a tort measurement of that standard it nevertheless is still a contract action, and the third-party defendant, Atlantic & Gulf Stevedores, are only responsible for the breach of that contract.

Ellerman Steamship Company says to you that if there is any liability which we owe to Mr. Beard that condition was created by Atlantic & Gulf Stevedores. That is your criterion: *Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and The City Line responsible to the Plaintiff? There again you have to run the whole gamut of facts in the case.* You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. *Did they breach that contract to do it in a workmanlike manner with the utmost care?* The steamship company says, "Yes, they did. They breached *that contract.* They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants."

In other words, did the liability of the Ellerman Lines, Limited, and *The City Line, Limited, arise out of any failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?* If you answer that yes, then your next inquiry is: Was the breach of this contract by Atlantic & Gulf Stevedores a substantial factor in bringing about the injuries to the plaintiff?

. . . If you find that Atlantic & Gulf Stevedores did breach *their contract* with the defendant, and that they were the contributing cause of the liability which they incurred to the plaintiff then you should render a verdict in the amount, same amount, which you rendered against the defendant, and you should render that against the third-party defendant, Atlantic & Gulf Stevedores." (Emphasis added.)

It is evident from the quotation of the charge on this point, that although the shipowner had presented no evidence on any other point except the use of the bale hooks, the District Court told the jury that the *whole* contract should be adverted to, and left to them whether there was *ANY* breach of that contract. He left to them whether there was a substandard performance of *any part of the contract* and whether the liability of the shipowner arose "out of *ANY* failure on the part of" Petitioner.

Thus it is evident that the Trial Judge specifically followed the mandate of this Court in the *Porello* and *Weyerhaeuser* cases whereas the action of the Court of Appeals was in direct conflict with the rules of law enunciated in these cases.

Relating the special verdict of the jury to the contract here involved, it is obvious that the injuries were not caused by any failure or negligence of the Petitioner or any act constituting a breach of contract.

The Court of Appeals Erroneously Reversed the Findings of the Jury and the Judgment Entered Thereon in Total Disregard of the Evidence in Support of the Verdict Without Reference to the Terms of the Express Written Contract Between the Parties and Seizing Upon a Suggestion by Counsel for Petitioner, That the Jury Could Have Found Negligence of the Shipowner on the Basis of Improper Stowage Assumed That the Jury in Fact So Found, Totally Disregarding That Other Independent Grounds of Negligence of Shipowner of Which the Jury Acquitted Petitioner, Were Equally Supported by the Evidence.

The ship's failure to examine the bands of the bales at the time of stowage in India; the improper stowage of the two consignments; the failure to discharge the New York consignment before the arrival of the vessel in Philadelphia

and the "unseaworthiness of the vessel", created by these failures and conditions, were all facts and conditions in existence before the initial application of the contract to the particular job here involved. The jury's special verdict holding the shipowner negligent could, as in *Weyerhaeuser*, have been predicated as to negligence on any one of these factual grounds, all existing prior to and in the absence of any act or conduct of the Petitioner, and which would "prevent recovery" of indemnity in the third-party action. (*Weyerhaeuser*, 355 U. S. p. 568.)[4]

To hold that a stevedore may be liable as an indemnitor for the liability of a shipowner caused by the shipowner's negligence and conditions committed and existing at the time of the application of the contract and merely for working under such conditions or for the interaction of such conditions, equipment or stowage which the Petitioner did not control and had no duty to supply, repair, correct or control, is to make of the stevedore an absolute guarantor and to create a contractual indemnity far beyond the compass of the agreement actually made and here involved: *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957) aff'd per curiam, 254 F. 2d 600 (3rd

4. The Circuit Court seized upon a suggestion, of counsel for petitioner, in its brief, that the jury *could* have found negligence of the shipowner on the basis of improper stowage of the New York cargo and assumed that the jury had in fact so found, totally disregarding that its finding (Interrogatory 2) that shipowner was negligent could have been made upon other independent grounds of negligence equally well supported by the evidence. On this *speculative* suggestion, made only as part of the argument, as being within the realm of possibility, the Court below predicates its holding, treating it as an established fact. Forced to recognize that it was only *speculative* however the Court below evidences the utter weakness of the assumption when it says (289 F. 2d 201, 207): ". . . and thus *if* it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic, to "handle" the cargo in the unsafe place to work." (Emphasis supplied.)

The fact is that the answer to Interrogatory No. 2 was justified for any one of several reasons supported by the evidence other than the one "suggested" by the Petitioner's counsel and such other grounds did not involve the Petitioner at all.

Cir. 1958), which held that under such circumstances the stevedore was performing, not breaching, the contract.

Under the facts presented by the evidence, nothing short of a contract agreeing to hold the shipowner harmless or indemnifying the shipowner against its own independent negligence and expressly accepting liability to Petitioner's employees caused by the shipowner's acts in creating or causing an unseaworthy condition, in whole or in part, could be held to impose such absolute liability on the stevedore—No Such Contract Existed.

The effect of the decision of the Court of Appeals is to create such absolute liability on the part of the stevedore who enters into *any* indemnity agreement no matter how carefully the language of the agreement is written to limit such indemnity. Since a stevedore is generally deemed to be an "expert" the conclusions reached by the Court of Appeals in this case, if allowed to prevail as the applicable law, would require every Court to hold that the "expertise" of the stevedore is in itself a sufficient substitute for a specific and clear agreement to be liable as an indemnitor. This is directly contrary to the holding of *Porello* and *Weyerhaeuser*.

A contract for indemnity against the consequences of one's own negligence must be clear and definite in its provisions: *Chicago R. I. & P. R. Co. v. Williams*, 245 F. 2d 397. The language employed must clearly and definitely show an intention to indemnify against a certain loss or liability; otherwise it is not a contract of indemnity: 42 C. J. S. Indemnity Section 5; *Frankel v. Johns Manville Corp.*, 257 F. 2d 508; *Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 35, 36. In the latter two cases the indemnitees were found to be negligent, while the indemnitor, as in our case, was found not to be negligent. The Court, in each case, pointed out the necessity for unequivocal language, if one is to be indemnified against his own negligence and denied recovery to the indemnitee: Cf. *Salamy v. New York Central System*, 146 N. Y. S. 2d, 814.

An agreement by a stevedore to indemnify a party for liability for personal injuries must express an intention to throw loss upon the indemnitor beyond peradventure of a doubt: *Pierce v. Erie R. Co.*, 165 F. Supp. 216, aff'd 264 F. 2d 136.

The recognition of this distinction between an express and an implied contract is well established and, where an express contract exists, the law will not imply a different agreement: *Martin v. City of Port Huron*, 111 F. 2d 759 (C. C. A. 6th 1940); *Haver v. Bond Stores*, 178 F. 2d 836 (C. C. A. 6th 1950); *Ferroline Corp. v. General Analine & Film Corp.*, 107 F. Supp. 326, affirmed 207 F. 2d 912, cert. denied 74 S. Ct. 678, 347 U. S. 953, rehearing denied 74 S. Ct. 748, 347 U. S. 979.

It is not believed that this Court intended in the *Ryan* case, or any case involving similar issues since that time, to undermine the Longshoremen's Act or to announce as an absolute principle of law that, without regard to whether a stevedoring company intends to agree to indemnify or agrees to indemnity only in the event of certain contingencies involving its own negligence, it has nevertheless agreed to absolute liability for such indemnity merely because it agrees to do a job. We submit *Weyerhaeuser* makes it clear that this was not this Court's intention in *Ryan*. On the contrary *Weyerhaeuser* makes it clear that in the *presence* of a written contract, the terms of the writing must be considered and will control.

The Court of Appeals in the instant case held instead that the contractual obligation of the stevedore was to be equated with the duty of the shipowner to the Plaintiff. Hence, solely on the fact that the shipowner was found to be negligent it concluded that the stevedore had to be negligent, despite the jury's special verdict to the contrary.

The effect of the holding of the Court of Appeals is to thwart entirely the import of the limited liability of a stevedore which the Longshoremen's Act was deliberately designed to afford except where the stevedore specifically and

voluntarily assumes burdens beyond the Act by contract. There is no evidence in this case to support the conclusion of the Court below that the Petitioner voluntarily agreed to give up the limited liability which the Longshoremen's Act afforded. It agreed contractually and in writing merely to do its work "with every care and due dispatch to the satisfaction of" the shipowner (148a, Appellant's Appendix). (Since there was no damage to cargo the agreement to pay for damage to cargo if "caused through rough handling and/or theft or pilferage by the stevedore's men during the time of stevedoring operations" is not applicable here (152a, Appellant's Appendix)). *There are no other words or language* in the agreement relating to indemnity. The absence of such words in the presence of a written contract setting forth in detail the rights, duties, and obligations of the parties must be held to mean that no voluntary burden of indemnity was assumed or accepted. Since the shipowner wrote the contract and found no difficulties in clearly imposing an obligation of indemnity in the case of damage to cargo it must be assumed that if he had wanted indemnity as to other losses or injuries he could have so stated in clear, unambiguous and unmistakable terms.

The decision of the Court of Appeals is contrary to law generally and in direct conflict with *Porello* and *Weyerhaeuser*.

Third Point: The Conflict Between the Court Below and the Courts of Appeal for the Second, Fourth and Ninth Circuits, and Between Divisions of the Third Circuit and the Conflict Between Decisions Within Each of These Circuits.

The decision of the Court below in the instant case is directly in conflict with the decision of the Ninth Circuit in *United States v. Harrison*, 245 F. 2d 911 (9th Cir. 1957); *Amerocean Steamship Co. v. Copp*, 245 F. 2d 291 (9th Cir.

1957), which are themselves inconsistent with *American President Lines Ltd. v. Marine Terminal Corp.*, 236 F. 2d 753 (9th Cir. 1956) and *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (9th Cir. 1950). The decision in the instant case is likewise in conflict with the decision in the Second Circuit of *Reddick v. McAllister Lighterage Line*, 258 F. 2d 297 (2nd Cir. 1958); certiorari denied 358 U. S. 908, 3 L. Ed. 2d 229, 79 S. Ct. 235, which in itself is in conflict with *Booth Steamship Company v. Meier and Oelhaf Company*, 262 F. 2d 310 (2nd Cir. 1958) and the decisions of the Fourth Circuit in *Calmar Steamship Corporation v. Nacerima Operating Company*, 266 F. 2d 79 (4th Cir. 1959), and *American Export Lines, Inc. v. Revel*, 266 F. 2d 82 (4th Cir. 1959). The instant decision of the Court below is also in conflict with the decisions of the Third Circuit in *Hagans v. Farrell Lines*, 237 F. 2d 477; and *Hodgson v. Lloyd Brasilero Patrimonio Nacional*, decided July 6, 1961.

In the *Harrison* case (*supra*) the Court held that, even where an express indemnification contract exists, recovery over against the stevedore may be denied if the negligence of shipowner is by far the major factor in causing the injury, so that it would be against public policy to shift such a loss to the stevedore. The trial court held the United States liable to the injured stevedore but dismissed the Third-Party Complaint because the stevedoring company was not negligent and the Ninth Circuit affirmed by a divided Court. The majority concluded that a shipowner cannot by contract shift to the stevedore the duty to keep the ship seaworthy.

Referring to *Sieracki* (328 U. S. 85, 100), the Court of Appeals found that the obligation was directly against the shipowner and concluded that the ship and its owner could not be relieved of the continuous duty of keeping her seaworthy especially where the unseaworthiness was not caused by the stevedore. It held that liability of the stevedore could not be read into the indemnity agreement because he

did not risk breach of his contract by refusing to unload in the face of an open and notorious condition for which the officers of the ship and crew were entirely responsible. It refused to place a premium upon unseaworthiness of the ship and negligence by her crew and officers, saying that to do so would reverse "the maritime policy of ages which has even firmer foundations under modern conditions" (245 F. 2d 911, 915).

In the *Copp* case (*supra*) the Ninth Circuit denied indemnity on the basis that both the vessel and the stevedore were joint tort feasors, concurrently, continuously, and actively negligent, and that such negligence on the part of both was the proximate cause of the Plaintiff's injury.

In short, the Court held that the shipowner can recover by way of indemnity only where the stevedore is negligent and the breach of duty is the sole proximate cause of injury and the ship is unseaworthy but not where both are negligent.

In *Copp*, the Ninth Circuit did not even mention the somewhat inconsistent implication of *American President Lines v. Marine Terminal Corp.*, (*supra*) which was decided by a different panel of the same Circuit only nine months earlier. In the latter case the shipowner sought to recover over against the stevedoring contractor the sum paid in settlement to a longshoreman, employed by the stevedore. The injury was caused by the absence of a lock on some beams in the ship. The shipowner notified the stevedore of this condition and requested that it be repaired. The contract specifically required the removal of such beams. The unloading operation was then continued under the unsafe condition which was known by both the shipowner and the stevedore. The shipowner first tried to establish its claim to indemnity under the authority of *States Steamship Co. v. Rothschild International Stevedoring Co.*, 205 F. 2d 253 (9th Cir. 1953) and *Bentz v. Compania De Navigacion*, 213 F. 2d 397 (2nd Cir. 1954) on the ground that its liability to the longshoreman arose only from unseaworthiness while

the stevedore was negligent. The Ninth Circuit rejected that theory since the evidence showed the shipowner was itself negligent. However, the Court granted indemnity to the shipowner under the authority of the *Ryan* case reasoning that the stevedore breached its implied contractual duty to perform in a safe and workmanlike manner by failing to remove the beam, continuing the work under known hazardous conditions, *and in violation of the express terms of the contract.*

In *United States v. Rothschild*, (*supra*) the Ninth Circuit in a factual situation strikingly parallel to that considered by the Third Circuit in the *Hagans* case allowed indemnity on a tort theory holding that the stevedore was actively negligent in permitting the Plaintiff to continue work when the stevedore had knowledge of a defective winch. It held the passive negligence of the vessel in supplying the defective winch did not preclude the recovery of indemnity. Since the Supreme Court in the *Ryan* case did not pass on the question of a non-contractual right of indemnity this case still stands as authority for the recovery of indemnity on a non-contractual basis.

In *Reddick v. McAllister Lines Ltd.*, (*supra*) a longshoreman was injured when he fell from a defective wooden crate on a ship during unloading operations. The trial court held the ship unseaworthy, found the longshoreman had not been furnished with a safe place to work because of the defective crate, but allowed indemnity on the basis that the stevedore was negligent in stowing the crates too closely. The Second Circuit reversed and denied indemnity on the theory that the injury was caused by the defective crate and that the stevedoring company's breach of warranty in loading the cargo improperly was not a cause of the injury. Recognising that in *Ryan* and *Weyerhaeuser* this Court held the application of tort theories of liability, i.e., "active" or "passive" and "primary" or "secondary" negligence inappropriate, the Court of Appeals held, nevertheless, that under the general test of foreseeability applied

to contractual liability, the breach must be the cause of the injury to impose liability on the stevedore.

The decision of the Second Circuit in the case of *Booth Steamship Co. v. Meier and Oelhaf Co.*, (*supra*) involved an indemnity suit by the vessel against a contractor hired to repair the vessel's engines. An employee of the contractor incurred an injury as a result of a defective wire strap on equipment used by the contractor. The injured man recovered against the vessel on the basis of unseaworthiness. It was agreed by both parties in the indemnity action that the injuries incurred by the Plaintiff *were not the result of negligence of either the vessel or the repair contractor.* The Court of Appeals considered that the question before it was whether a contractor who undertakes to do work aboard a vessel *and to supply the equipment essential to the job and who takes over control of the work to be performed,* is liable for the damages incurred by the owner when the contractor's employee is injured because of an unseaworthy condition resulting from the presence of defective equipment which the contractor supplied without fault. The Court found that this question was not involved in either the *Ryan* or *Weyerhaeuser* cases since in each of those cases *the non-discovery of the cause of the injury constituted a negligent omission* of one of the parties, but held that it did not believe that these cases excluded the existence of liability without fault as an element of the warranty of workmanlike service in appropriate cases.

The case is significant, of course, because it indicates a liability without fault theory applied to a breach of the implied warranty to perform the service in a workmanlike manner. It seems clear, however, that the Court restricted the application of this theory to a situation *where the contractor actually supplied his own equipment and a defect in the equipment is the cause of the ensuing injury.*

In *Calmar Steamship Co. v. Nacirema Operating Co.*, (*supra*) the Court of Appeals for the Fourth Circuit re-

versed the decision of the trial court that the shipowner was not entitled to indemnity if its breach of contract was a proximate cause of the injury. The contract between the parties specified that the operator would provide lights for night work. The evidence showed that one of such lights was not "seized" (tied or taped to the cable). The District Court held that the operator breached its contract with the stevedoring contractor in failing to supply a reasonably safe and serviceable light and therefore was not entitled to indemnification. The Fourth Circuit, relying upon *Crumady* (decided after the Lower Court's opinion) concluded that the operator was entitled to indemnity. It recognized that *Crumady* did not undertake a definitive statement of the conduct on the part of the shipowner which would bar indemnity, but believed it indicated that furnishing defective equipment will not necessarily have that effect. Hence, it undertook to "*compare*" actions of *Calmar* with those of the owner in *Crumady* and concluded that they did not preclude recovery. *It is to be noted that in both Calmar and Crumady there was a finding of the stevedoring company's negligence which brought "into play the unseaworthy condition of the vessel."* There was no such finding in the instant case. Indeed the jury's finding was to the contrary.

In the *Revel* case (*supra*) (decided by the same Court as *Calmar* on the same day) the shipowner supplied a defective winch. After reporting the defect and receiving instructions to continue to operate, the stevedore used the winch. The Fourth Circuit referring to *Crumady* concluded that the shipowner was not barred from recovering indemnity because of negligently supplying defective equipment. The Court did not attempt to explore what conduct, in other circumstances, would be "sufficient to preclude recovery". It merely held that in its opinion under the decisions of the Supreme Court the limits were not transcended.

The decision in the instant case is directly in conflict with the decisions of the Third Circuit in *Hagans v. Farrell*

Lines, (*supra*) followed in *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957), affirmed per curiam 254 F. 2d 600 (3rd Cir. 1958), and *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, (*supra*).

In the *Hagans* case, it was held that the shipowner may not be entitled to indemnity if its breach of contract caused the injury and the stevedore's wrongful conduct consisted only of failing to discover and correct the shipowner's breach. Hence the Third Circuit held the shipowner was not entitled to indemnity from the stevedore where the injury resulted from a defective and unseaworthy winch which contractually was to be furnished by the shipowner and was negligently used by the stevedore but was not the primary proximate cause. By analogy to *Ryan* the Court declared that "the promisor cannot use the promisee's failure to discover and correct the promissor's own breach as a defense" (237 F. 2d 477, 482).

A petition for rehearing was denied with two judges (Chief Judge Biggs and Circuit Judge Maris) dissenting on this basis:

> "It would appear that the decision of this Court unduly limits the scope of the decision of the Supreme Court of the United States in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 1956, 350 U. S. 124, 76 S. Ct. 232. The decision also seems to us to be in conflict with *American President Lines Limited v. Marine Terminals Corporation*, 9th Circuit 1956, 236 F. 2d 753; *cf. United States v. Rothschild International Steve. Company*, 9th Cir. 1950, 183 F. 2d 181. For these reasons we think that the appeal should be reheard before the Court en banc."

The *Hagans* decision was followed in *Smith v. Pan-Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957), affirmed per curiam (254 F. 2d 600), three days short of the two months after *Weyerhaeuser*. In the *Smith* case, the stevedore's boss permitted his men to continue

to use a defective winch after reporting the defect to the ship's officers. Judge Kirkpatrick granted judgment n.o.v. in favor of the stevedore, the Third-Party Defendant, against the Third-Party Plaintiff, on the authority of *Hagans* (*supra*) reasoning that the stevedore's negligence did not supersede the ship's violation of its duty to furnish seaworthy equipment. He asked the piercing question:

> "Is it part of a stevedoring contract that the stevedore will walk off the job if he finds the ship's equipment unsuitable?"

He answered the question by stating:

> "It may be negligent for him not to do so but it is in furtherance of his contract rather than a breach of it, and the shipowner could hardly hold him liable for trying to complete the work."

The Fourth Circuit in *Revel* (*supra*), a post-*Crumady* decision, and the Second Circuit in *Shannon v. United States*, 235 F. 2d 497 (2d Cir. 1956), a pre-*Crumady* decision, are in conflict with *Hagans* and *Smith* decided by the Third Circuit.

Finally in *Hodgson* (*supra*) the Third Circuit (with the opinion writing judge and one other judge from the panel in this case sitting) had no apparent difficulty in deciding, despite the prior decision in the instant case, that:

> "It was for the jury to determine whether it was unworkmanlike for the stevedoring company to continue operating the winch, which it knew had been defective after receiving a categorical assurance from the shipowner's crew that it was 'O. K.'."

Contrary to the decision in the instant case, the Court held that an appellate Court will not interfere with a judgment entered on a verdict rendered by a jury simply because of its opinion as to the weight or preponderance of the evi-

dence. Moreover, as it did not do in this case, the Court examined the contract and found it required the stevedore to "provide all necessary stevedoring labor, including winchmen . . . and such other stevedore-supervision as are needed for the proper and efficient conduct of the work". The Court held that:

> "Under this agreement, the stevedoring company was not required to act as an insurer against any loss the shipowner might suffer, or to maintain the winches. *Calderola v. Cunard S. S. Co.*, 279 F. 2d 475 (C. A. 2), cert. denied 364 U. S. 884 (1960). Rather, such language constitutes a contractual undertaking by the stevedoring company to perform its services in a workmanlike, proper and reasonably safe manner. *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 124 (1956); *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 565 (1958); *Calderola v. Cunard S. S. Co.*, (*supra*). *Whether the stevedoring company's conduct constituted a breach of this provision was, of course, a question of fact for the jury. Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, (*supra*)." (Emphasis added.)

It is apparent that the opinion below is in direct conflict with the decision of this Court in the *Weyerhaeuser* and *Porello* cases and with the decisions of *Harrison* and *Copp* in the Court of Appeals of the Ninth Circuit and *Reddick* in the Second Circuit which are themselves in conflict with other decisions of the same circuits. Moreover, the decision in the instant case is directly in conflict with *Hagans* and *Hodgson* decided both before and after the instant case. *Hagans* was itself declared to be in conflict with *American President Lines*, (*supra*) and *Rothschild*, (*supra*) in the Ninth Circuit by Chief Judge Biggs and Judge Maris of the Third Circuit, (237 F. 2d 477, 483).

Upon this ground of conflict between circuits alone, certiorari should be granted.

Fourth Point: The Issues Involved Herein Are of Paramount Importance to the Survival of the Stevedoring Industry and to the Entire Shipping Industry.

The questions here presented are of paramount importance in the decision of longshoreman cases brought against shipowners and involving third-party actions for indemnity against stevedores, particularly when the contract between stevedores and shipowners is in writing. Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in almost every such case hereafter brought, including many cases now pending.

This decision places in grave doubt whether the express written undertakings and limitation of responsibilities between shipowner and stevedore have any meaning. It is of industry-wide concern that such a written contract can be nullified by imposing the duty on a stevedore to indemnify a shipowner for the breach of an implied warranty, by striking down a jury finding that the express provisions of a contract were not breached. The result reached is all the more untenable in this case since the right of indemnity is predicated on the assumption by the Court of Appeals that "*if* it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in an unsafe place to work" (289 F. 2d 201, 207). As in Weyerhaeuser, where several possible bases of negligence as to the shipowner existed there is no way of knowing that the jury did in fact base its finding of the shipowner's negligence on an alleged "unsafe place to work".

If the decision of the Court of Appeals is permitted to stand the encirclement of the stevedore has been completed. Congress passed the Longshoremen's and Harborworkers' Act to establish liability without fault, albeit in a lesser sum. It thereby relieved employers of large tort verdicts. In so doing, absolute liability was imposed upon the employer to

provide a fair measure of compensation to its injured employee. After the Longshoremen'sAct the claim by a shipowner for "contribution" was denied *where joint negligence existed. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952). Practical business consideration required stevedores to enter into written contracts pursuant to demands of the shipowners to agree to indemnity and hold the shipowner harmless from liability resulting *from the negligence of the stevedore.* Such a contract, if made, is not forbidden by the Longshoremen's Act and is properly enforceable. Such written contracts should be construed cautiously and indemnity allowed only when expressly and clearly assumed. The present case holds the stevedore liable for indemnity without limitation and with no reference whatever to the terms of the written contract.

The result is to make a stevedore wholly liable for all injuries to its own employees in the absence of any showing that its work could have been performed more safely. Thus the financial burden intended to be removed from the shoulders of the stevedore by the Longshoremen's Act has been replaced, although not voluntarily assumed or clearly justified by law or contract. Such harsh consequences can lead to the survival of but a few of the stevedoring firms who possess an infallible degree of "expertise" or a willingness, backed by sufficient wealth, to become an insurer. The end result must adversely affect the entire shipping industry. It is of particular importance to the stevedoring industry that certiorari be granted that it may be clearly understood whether written contracts between stevedores and shipowners defining the respective rights of each are to be disregarded as meaningless or given the recognition intended by the parties.

CONCLUSION.

The issues involved herein are of national importance to the stevedoring and shipping industry. The decision of the Court of Appeals is a major departure from the rulings

made by this Court and if allowed to stand will create further disharmony in the uniform application of the doctrines enunciated by the Court.

This decision is a sharp erosion of the Constitutional mandate that "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." Unless this decision is reversed further erosion of the mandate will surely follow.

Respectfully submitted,

JAMES J. DAVIS, JR.,
FRANCIS E. MARSHALL,
Counsel for Petitioner.

APPENDIX TO PETITION.

JUDGMENT OF THE U. S. DISTRICT COURT.

Before GANEY, *J.*

And Now, to wit: April 28th, 1958, in accordance with the Special Verdict of the Jury and the Direction of the Court, it is ORDERED that Judgment be and is hereby entered in favor of Plaintiff, Leighton Beard, and against the Defendants, Ellerman Lines, Ltd. and The City Line, Ltd., in the sum of One Hundred Thousand and 00/100 ($100,000.00) Dollars, together with costs, and it is

FURTHER ORDERED that Judgment be and is hereby entered in favor of Third-Party Defendant, Atlantic & Gulf Stevedores, Inc., and against Third-Party Plaintiffs, Ellerman Lines, Ltd., and The City Line, Ltd., with costs.

By THE COURT:

Attest: R. J. GREENWOOD,
Deputy Clerk.

ORDER OF THE U. S. DISTRICT COURT.

(Filed April 4, 1960.)

Now, this 4th day of April, 1960, It is Ordered by this Court that Defendants', ELLERMAN LINES, LTD., and THE CITY LINE, LTD., motion to set aside the verdict in plaintiff's favor and to enter judgment in their favor, and their motion for a new trial be, and the same are hereby, denied.[1]

/s/ J. CULLEN GANEY, *Ch. J.*

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1. Reddick v. McAllister Lighterage Line, Inc., et al., 258 F. 2d 297 (C. A. 2, 1958) and cases therein cited. Also see Gindville v. American-Hawaiian Steamship Co., 224 F. 2d 746 (C. A. 3, 1955).

OPINION OF U. S. C. A. 3.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,278.

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., and THE CITY LINE, LTD.,
Appellants,

v.

ATLANTIC AND GULF STEVEDORES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 18, 1960.

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT.

(Filed April 7, 1961.)

By KALODNER, *Circuit Judge.*

The plaintiff, Leighton Beard, brought this civil action, founded upon the diversity jurisdiction of the District Court,[1] against the defendants, Ellerman Lines, Ltd.

1. Plaintiff is a citizen and resident of Pennsylvania; defendants Ellerman Lines, Ltd. and The City Line, Ltd., are British corporations.

and The City Lines, Ltd. ("Ellerman"), to recover damages for personal injuries sustained in the course of discharging cargo from the latter's vessel, S. S. "City of Calcutta". Beard was a longshoreman in the employ of Atlantic and Gulf Stevedores, Inc. ("Atlantic"), a concern performing stevedoring services for the vessel. Beard's complaint alleged unseaworthiness and negligence. Ellerman joined Atlantic as third-party defendant, alleging in its third-party complaint that Beard's injuries were the result of Atlantic's negligence in discharging the cargo and in using devices which were "dangerous and improper" in doing so. Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The case was tried before a jury, which found in answer to specific interrogatories, in favor of Beard in his action against Ellerman, and against Ellerman in its third-party action against Atlantic. In its answers to the interrogatories the jury found the "City of Calcutta" was unseaworthy and negligent, and Atlantic without fault with respect to the accident which resulted in Beard's injuries. The District Court entered judgment in accordance with the jury's special findings in favor of Beard against Ellerman and in favor of Atlantic against Ellerman in the third-party proceedings. It later[2] denied Ellerman's alternative motions to set aside the verdict in Beard's favor or for a new trial.

Ellerman has appealed, asserting in sum that the evidence failed to establish unseaworthiness or negligence on its part; that the jury's finding that Atlantic was not negligent is inconsistent with its finding of negligence against Ellerman since if there was any negligence it was that of Atlantic; and that Ellerman is entitled to indemnity from Atlantic as "a matter of law", if we find that the

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2. Ellerman's motions were filed May 7, 1958 and orally argued on June 24, 1959. The District Court's Order denying the motions was filed April 4, 1960.

record sustains a finding of negligence in the discharge of the cargo.

The District Court did not file an opinion and it is necessary for that reason to set forth the facts in some detail:

On July 1, 1955, the "City of Calcutta" docked at a pier in Philadelphia. In its cargo were bales of burlap which had been loaded aboard in India. The bales each contained 30 to 40 bolts of burlap, enclosed in a burlap covering. Each bale, weighing between 1,000 to 1,200 pounds, had been compressed under tremendous pressure and circled with four parallel one-inch steel bands fastened together with a patented clip or buckle. Sixty-three tons of the bales, consigned to New York, were stowed in the forward end of the hold, which, by reason of the shear of the vessel, extended out halfway into the square of the hatch; and 100 tons of the bales, consigned to Philadelphia, were stowed toward the after end of the deck. The bales were stowed on their flat in tiers to the same height, and three was no separation between them except for their markings.

Atlantic's longshoremen started discharging the cargo at about 1.30 P. M. They used what are known as bale or burlap hooks which consist of a metal ring to which six lengths of manila rope are attached. At the opposite end of each rope there was a special flat metal hook. Two of these hooks were inserted under two bands of each of three bales by four longshoremen, two on each side of the bales, and a fifth man put the ring on the cargo hook at the joined ends of the runners from the cargo winches and gave the signal for the draft to be hoisted. The draft was then moved out into the square of the hatch under the hammer of the boom, which was positioned over Philadelphia bales, and hoisted out of the hold, across the ship and then lowered on to the pier.

The first of the bales were removed from the center of the hatch and then the bales were moved out from the wings one row or tier at a time. The New York bales were

not touched. There was enough space between the top tier of bales and the underside of the 'tween deck for the longshoremen to walk into the wings, and as a draft was hoisted they retreated into them.

At about 4.30 P. M. (three hours after the unloading had begun), when two tiers of the Philadelphia cargo had been discharged, a draft of three bales was attached to a set of burlap hooks by the longshoremen. These bales were in a row in the offshore wing under the coaming with approximately 12 feet of space above. As the draft, in the course of its hoisting, neared the coaming of the main deck hatch the middle bands of one of the bales broke and when the entire weight of the bale was placed upon the other band it too broke, and the bale dropped onto the New York bales, bounced off, bounded across one-half of the hatch, then some 20 to 25 feet astern of the after coaming, and struck Beard, pinning him against the after bulkhead.

Beard was taken to the hospital where his right leg was amputated, first below the knee and shortly thereafter above the knee. He was 41 years old at the time.

The facts, as stated, are not in dispute, nor is there any question presented here with respect to the amount of the jury's award of damages to Beard.

There was considerable testimony at the trial, expert and otherwise, that it was the custom in Philadelphia to use bale hooks in discharging bales similar to the type here involved, known as "gunnies"; that the Safety Rules for the safe handling of cargo, prepared by the Philadelphia Marine Trade Association, and used by stevedore personnel in Philadelphia, approved this procedure.

There was also testimony, by way of deposition of Donald Quinn chief officer of the "City of Calcutta" that Quinn had observed the manner in which the vessel's cargo of bales of wool as well as the bales of burlap were being discharged by Atlantic's men and that "they were going very quickly"; that Quinn had told one of Atlantic's men "with a bit of authority" that he thought the use of bale

hooks in discharging the bales of wool "was a dangerous way of discharging" and that he was informed "it was the custom of the port". Quinn also said that he had "explained" to Atlantic's men that "in India they get wire slings and put them around the bales so that each individual bale has a wire around it, and as they hold it tight, the wire tightens around it."

Quinn, however, did not direct Atlantic's men to discontinue their method of discharging the bales. There was expert testimony that the chief mate is responsible for the safety of personnel engaged in cargo operations and that his authority outranks the stevedore boss.

An expert metallurgist who had tested steel bands similar to those used here testified that in his opinion the particular bands on the bale that broke and struck Beard had "something wrong with the materials".

The foregoing presents the factual situation as presented to the jury.

On this appeal Beard contends that the jury's finding of unseaworthiness is amply supported for these reasons: "Ellerman had actual and constructive knowledge that the burlap bales would be hoisted out of the hold by use of hooks inserted under the bands of the bales", and, "It was therefore charged with the absolute duty of supplying bands to permit that activity to be accomplished in reasonable safety"; in the instant case "the bands were inadequate", and the burlap bales created an unseaworthy condition because they were not capable of "being handled for the purpose of loading and discharge" by the bale hook method customary in Philadelphia.

Beard further contends that the jury's finding of negligence on Ellerman's part was supported by the testimony that Ellerman had failed to provide him with a "safe place to work" in that (1) Ellerman breached its duty "to use reasonable care to ascertain the methods and manner in which the work was done and to forbid the use of a method which was hazardous to his [Beard's] safety" and the failure of the chief mate to take effective

measures to prevent an unsafe method of discharging the burlap bales constituted negligence; further (2) Ellerman's "failure to discharge the New York bales in that port rendered the place of work unsafe and the defendant negligent", inasmuch as had the New York bales been discharged in New York the bale which had dropped would "normally strike a flat surface and roll or bounce but a few feet", while here the dropped bale "bounced off and rolled all the way to the after bulkhead of the No. 1 hold, one-half the distance of the square of the hatch, and in addition, 20 to 25 feet underneath the after 'tween deck."

Atlantic's position is that the jury's finding, in answer to Interrogatory No. 4, that the "fault" of Ellerman did not "arise out of any failure" on its part, was supported by the evidence that its use of the bale hook method was customary and not negligent; that the jury's finding that Ellerman was negligent could properly have been premised on its failure to provide Beard with a "safe place to work" in that it had not discharged the New York bales at that port and they were so stowed that Beard was exposed in the discharging operation to the catapulting of the dropped bale which caused his injuries.

Atlantic contends that, for the reasons stated, the jury's finding with respect to it is not inconsistent with its finding that Ellerman was negligent.

The District Court, in its charge, dealt with the theories of Ellerman's negligence advanced by Beard.

On the score of the jury's finding, in answer to Interrogatory No. 2, that Ellerman was negligent, Ellerman[3] and Atlantic both urge that the answer fails to disclose whether it was based on (1) use of the bale hook method in discharging the burlap bales; or, (2) failure of Quinn, Ellerman's chief mate, to stop Atlantic from pursuing the bale hook method of discharge which he had characterized as "dangerous"; or, (3) failing to provide Beard with a

3. Ellerman says: "It is impossible to tell what conduct by Ellerman was found to constitute the conclusion 'negligence'".

safe place to work in view of Ellerman's failure to discharge the New York bales at that port and their position with relation to the bales which were being discharged at the time of the accident.

Interrogatory No. 2 which presented to the jury the issue as to whether Ellerman was negligent reads as follows:

> "Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the plaintiff?"

The jury's answer to the interrogatory was "Yes".

In disposing of Ellerman's appeal from the jury's finding that its negligence "was a substantial factor in causing injuries to the plaintiff", we are required only to determine whether there was substantial evidence adduced at the trial with respect to any one of the three theories of negligence on Ellerman's part which measured up to the applicable standard of legal proof and thus permitted the jury's fact-finding that Ellerman was negligent.

On the score of whether the record affords a substantial basis for a finding that Beard's injuries were caused by *somebody's* negligence in the discharge of the burlap bales this extraordinary situation presents itself:

Both Ellerman and Atlantic do not really question that sufficient evidence was adduced in the record to establish that Beard was injured as a result of negligent conduct of the discharging operation; indeed they virtually concede that the record establishes such negligence—they only differ as to the nature of the negligent acts and with respect as to who was guilty of the negligent conduct.

Says Ellerman, in its brief:[4]

> "We dispute that Ellerman was negligent and assert rather that the negligence here was *solely* that of the stevedore [Atlantic]." (Ellerman's emphasis.)

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4. Page 22 "Brief for Appellant".

That statement was made in consonance with Ellerman's position that Atlantic was in full control of the discharging of the cargo; it was an "expert in the field"; "It was Atlantic's method of pulling out the cargo, not Ellerman's"; "Ellerman would not be negligent for failing to either supervise or take over and itself perform the details of the work"; and, while Atlantic's negligence would make Ellerman liable to Beard, Ellerman was thereby entitled to indemnity from Atlantic under their contract for stevedoring services because of Atlantic's "sub-standard" performance.[5]

Atlantic, replying to Ellerman's contention here that the jury's finding of negligence on its part was inconsistent with its finding, in answer to Interrogatories Nos. 4 and 5, that Atlantic was free of fault, made this statement in its brief:[6]

> "Appellant [Ellerman] conveniently fails to acknowledge that other issues were submitted *upon which the Jury could properly have found negligence on the part of the shipowner.* Plaintiff, through his counsel, contended that Ellerman was negligent in failing to provide Plaintiff with a safe place to work. Evidence was offered which established that certain New York cargo was not removed at that port, was stowed in a position exposed to this unloading operation and was the very means by which the falling bale was catapulted against Beard. . . .
>
> ". . . *The Jury could properly find and by its verdict undoubtedly did find that Ellerman was guilty of negli-*

5. In its third-party complaint against Atlantic, Ellerman averred that if it should be held liable to the plaintiff "then the third party is liable over" to it "by reason of" Atlantic's failure "to properly perform the work of unloading"; Atlantic "*was negligent in the manner in which it undertook to unload cargo*"; Atlantic "supplied and used devices in connection with the unloading . . . which were dangerous, improper and, in addition, violated the terms of the [stevedoring] agreement." (Emphasis supplied.)

6. Pages 8-9 "Brief for Atlantic and Gulf Stevedores, Inc., Appellee".

gence in stowing the New York cargo with the Philadelphia cargo in the center of the hatch opening.

"From the description of the accident by all the eyewitnesses, *it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard.* (emphasis supplied).

In view of what has been said it is unnecessary for us to discuss in detail all the evidence relating to the issue of negligence. We have but to say that the record affords ample basis for the jury's finding that Ellerman was negligent.

For example, there was evidence that bands of bales "broke" in "roughly between 3 and 5 percent of the bales" during discharging operations.[7] It is true that there was considerable testimony, as earlier stated, that it was the custom in Philadelphia to use bale hooks in discharging burlap bales and that the method was approved by the Philadelphia Marine Trade Association, but as we held in Curtis v. Carcia Y Cia., 272 F. 2d 235, 237 (1959) "such custom, though it may be evidence of reasonableness, is not conclusive," and the jury may find, if there is sufficient basis in the testimony, that the customary method does "not satisfy the standard of reasonable care."

Further, there was testimony by Ellerman's own chief mate, Quinn, earlier referred to, that in his opinion the use of bale hooks "was a dangerous way of discharging", and that he had "explained" to Atlantic's man that in India, in handling burlap bales they used the sling method.

On the score of Quinn's testimony it must be said that his failure to take effective measures to stop the use of the discharge method which he condemned as "dangerous", would constitute negligent conduct for which Ellerman was liable in the event of a jury finding that the discharging procedure was in fact "dangerous", as he deemed it to be.

7. Testimony of Captain William Wheeler, associated with a firm of marine consultants.

Also, there was testimony that those engaged in the task of discharging the bales were exposed to a hazardous situation, by virtue of the stowage of the New York bales with respect to the bales which were being unloaded, and thus were not afforded a "safe place to work", which is, of course, negligence on the part of those responsible. The testimony on this score, as earlier stated ,was deemed ample by Atlantic, an expert in the field, to sustain a finding that Elerman had failed to provide "a safe place to work".

It is settled law that Ellerman owed to Beard the obligation to provide him with a safe place to work, and its failure to do so constituted negligence.

It is equally settled that Ellerman was under a duty to use methods which complied with the standard of reasonable care in the discharge of its cargo, and to forbid the use of a discharge method by the stevedore of its selection which did not conform to a standard of reasonable care.

"The work of loading and unloading is historically 'the work of the ship's service' ", as the Supreme Court said in Crumady v. The J. H. Fisser, 358 U. S. 423 (1959).

Whatever inconsistency Ellerman sees in the jury's answers to Interrogatories Nos. 2 (in which it was held negligent) and 4 (in which Atlantic was absolved from liability over to Ellerman), it is not one which aids Ellerman in Beard's action against it. In answering Interrogatory No. 2, the jury was determining the issue of negligence between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the contractual obligation of Atlantic to Ellerman. The issue for us on appeal with respect to this Interrogatory is whether as a matter of law Atlantic can be relieved of its contractual obligation in any circumstance of this case. The fact, that the jury believed either that the contractual obligation of Atlantic to Ellerman did not coincide with the duty of Ellerman to the plaintiff, or that Atlantic properly discharged its contractual obligations, if erroneous, would not require that we reverse the finding of liability as between the plain-

tiff and Ellerman, if that finding is supported by the evidence, as we have found that it does.

What has been said brings us to Ellerman's contention that if it "is liable to Beard upon a theory of negligence . . . the undisputed evidence required the District Court to enter . . . judgment in Ellerman's favor [against Atlantic] because it was clearly Atlantic's action which brought about the result and clearly it constituted a breach of a warranty of workmanlike service."

Our consideration of Ellerman's contention is controlled by the principles recently summarized in Waterman Co. v. Dugan & McNamara, 364 U. S. 421, 423 (1960), as follows:

> "In *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. *This warranty of workmanlike service extends to the handling of cargo, as in Ryan, as well as to the use of equipment incidental to cargo handling,* as in *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563. The warranty may be breached *when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. Crumady v. The J. H. Fisser*, 358 U. S. 423, 429. . . ." (emphasis supplied).

Application of the principles stated to the indemnity action compels the determination, under the particular facts here and the jury's finding with respect to Ellerman's negligence, that Ellerman is entitled to indemnity from Atlantic as a matter of law.

As already pointed out, the record affords ample basis for a jury fact-finding that (1) use of the bale hook method in the discharge of the burlap bales constituted negligence, and (2) that the injured longshoreman was not afforded a safe place to work.

Atlantic suggests that the jury's finding that Ellerman was negligent was based on its failure to provide a safe place to work in view of the fact that the New York cargo "was stowed in a position exposed to this unloading operation and *was the very means by which the falling bale was catapulted against Beard*", and says that *"the jury could properly have found negligence on the part of the shipowner"* in this situation, *and "it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard."* (emphasis supplied.)

Atlantic hoists itself on its own petard in stating that the evidence established that the New York stow, as positioned when the Philadelphia bales were being discharged, created an unsafe place to work.

Under the principles above stated, the "warranty of workmanlike service to perform the obligations of the contract with reasonable safety", extends to the handling of the cargo, and thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to "handle" the cargo it charged, created an unsafe place to work.

It was Atlantic's conduct in proceeding to unload cargo in an unsafe place to work which "called into play" the unsafe condition which prevailed, and under Crumady v. The J. H. Fisser, *supra,* it breached its warranty to Ellerman.

What was said in American President Lines v. Marine Terminals Corp., 234 F. 2d 753, 759, 60 (9 Cir. 1956), cert. den. 352 U. S. 926, is significantly applicable here:

> ". . . We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence . . . and in face of all that

> proceeded to breach its duty so as to make that negligence an immediately dangerous force . . .[I]t was the stevedore's breach of duty that created the danger and made it an active condition with immediately forseeable consequences of personal injury."

The "expertise" of Atlantic in the handling of cargoes should have made it aware of the dangers inherent in the discharge of the Philadelphia bales in view of the presence of the New York stow. If a jury could "properly find", as Atlantic urges, that Ellerman was negligent in permitting the discharge under the circumstances which prevailed, because of their obvious dangers, it certainly follows that Atlantic, an expert in the field of handling cargo, should have shown an awareness of the situation and taken steps to avoid that which happened or refused to proceed with the discharge of the cargo until the site of discharge was made "a safe place to work."

It must here be noted that the District Court in its charge to the jury with respect to the indemnity action failed to instruct it that if Atlantic carried on the discharge of the Philadelphia bales in a place unsafe to work that it was guilty of a breach of its "warranty [to Ellerman] to perform the obligations of the contract with reasonable safety."

The District Court erred in this respect and to its error may be attributed the fact that the jury, in its answer to Interrogatory No. 4 acquitted Atlantic of "any failure . . . to do its work in accordance with its contractual obligation."

Further, in its charge to the jury the District Court prescribed the "criterion", as it put it, of Atlantic's performance of its contract, as follows:

> "You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook."

The phrasing of this instruction was such that it made the sole "criterion" of the jury's test as to whether Atlantic had breached its contract of "workmanlike service" in the use of the bale hook method in discharging the cargo.

The error of this instruction, as well as the error committed when the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work, was further compounded by a last-minute instruction to the jury, following conclusion of the charge in chief, and just before the jury retired. The instruction referred to follows:

> "If you find that Atlantic & Gulf Stevedores, Mr. Marshall's client, was unloading the bales in a proper and safe manner, *using a method that was in accordance with the practice, customs, and usage in the Port of Philadelphia,* and that that was not in violation of their breach of contract which obtained between them, *then your verdict must be in favor of the Atlantic & Gulf Stevedores.*" (emphasis supplied.)

It may be noted that exception was taken to this instruction by Ellerman.

In summary, we are of the opinion that the testimony adduced afforded ample basis (as Atlantic itself says) for a jury finding that the discharge of the Philadelphia bales was carried on in an unsafe place to work and while that finding made Ellerman liable to Beard it also made Atlantic liable, as a matter of law, to Ellerman for indemnity for its breach of warranty as previously detailed.

The opinion stated makes it unnecessary for us to consider the issue of unseaworthiness [8] which was premised on Beard's view that the doctrine of unseaworthiness ex-

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8. Hudgins v. Gregory, 219 F. 2d 255 (4 Cir. 1955).

tends to the packaging of the ship's cargo;[9] and that the cargo in the instant case was "unseaworthy" by reason of the "inadequacy" of the steel bands used to bind the burlap bales.

For the reasons stated the judgment of the District Court in favor of the plaintiff Leighton Beard and against the defendants, Ellerman Lines, Ltd. and The City Line, Ltd. will be affirmed, and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. will be reversed, and the cause remanded with directions to the District Court to proceed in accordance with this opinion.

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9. It may be noted that plaintiff relies in this respect on the holding of the Second Circuit in Reddick v. McAllister Lighterage Co., 258 F. 2d 297 (1958), cert. den. 358 U. S. 908 where it was said (p. 299):

". . . the holding of unseaworthiness may also be predicated on the latent defect in the cargo crate". But see Carabellese v. Naviera Aznar, S. A., 285 F. 2d 355 (1960) where the Second Circuit limited *Reddick* to its particular facts and said it was "not disposed" to extend the doctrine of unseaworthiness to include "cargo safe to handle".

ORDER OF U. S. C. A. 3 DENYING PETITIONS FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,278.

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.,

v.

ATLANTIC AND GULF STEVEDORES, INC.

SUR PETITION FOR REHEARING.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

AFTER DUE CONSIDERATION THE PETITIONS FOR REHEARING IN THE ABOVE-ENTITLED CASE ARE HEREBY DENIED.

By THE COURT,

KALODNER, *Circuit Judge.*

DATED:
May 31, 1961.

ORDER OF U. S. C. A. 3 STAYING ISSUANCE OF MANDATE.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,278.

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.,
Appellants,

v.

ATLANTIC & GULF STEVEDORES, INC.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

It is ordered that issuance of the mandate in the above case be, and it is hereby stayed until August 4, 1961.

By THE COURT,

KALODNER, *Circuit Judge.*

June 9, 1961.

JUDGMENT OF U. S. C. A. 3.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,278

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.,
Appellants,

v.

ATLANTIC & GULF STEVEDORES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

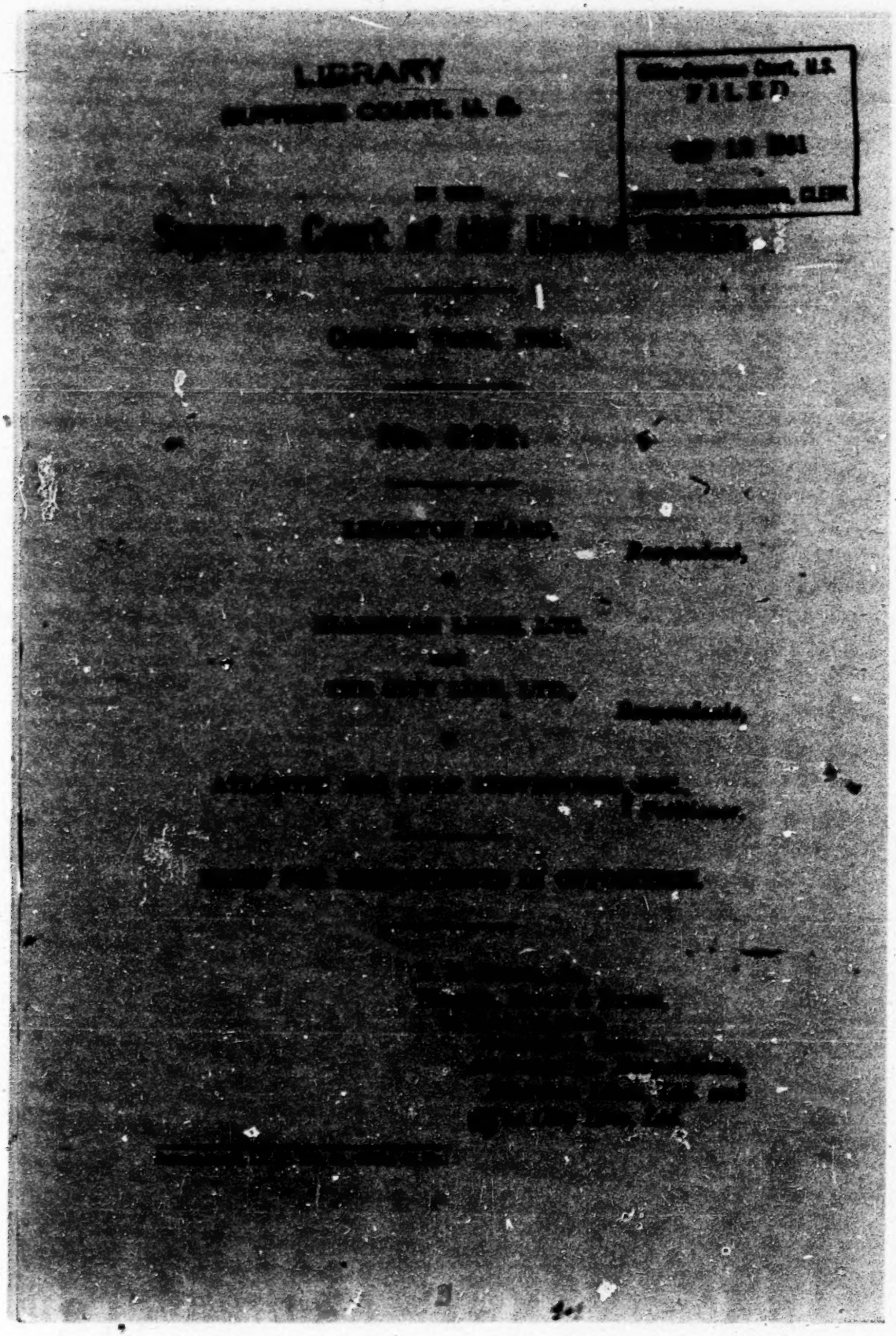
Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of the plaintiff Leighton Beard and against the defendants Ellerman Lines, Ltd. and The City Line, Ltd., be and the same is hereby affirmed, with costs; and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. be, and the same is hereby reversed, with costs; and the cause remanded with directions to proceed in accordance with the opinion of this Court.

ATTEST:
IDA O. CRESKOFF,
Clerk.

April 7, 1961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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 282.

LEIGHTON BEARD,

Respondent,

v.

ELLERMAN LINES, LTD.

and

THE CITY LINE, LTD.,

Respondents,

v.

ATLANTIC AND GULF STEVEDORES, INC.,

Petitioner.

BRIEF FOR RESPONDENTS IN OPPOSITION.

These respondents do not dispute the accuracy of the matters under the headings "Opinion of the Courts Below"; "Jurisdiction" and "Statement of the Case" as presented in the petition, and these are accordingly omitted in the interest of brevity.

QUESTION PRESENTED.

In an action where the parties, P. v. D1 v. D2, are a longshoreman, a shipowner and a stevedore-contractor respectively, and the Court of Appeals sustains a verdict in favor of P. against D1 solely upon the ground that P. "was injured as a result of negligent conduct of the discharging operation" performed by D2, may not the Court enter judgment for indemnity as a matter of law where there was no jury finding upon this point because, as the Court of Appeals said:

> ". . . the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work . . ." [Opinion 16a]?

REASONS WHY THE PETITION SHOULD BE DENIED.

This is not so much a brief in outright opposition to the petition of Atlantic and Gulf Stevedores, Inc. [hereinafter "petitioner" or "Atlantic"] as it is an examination of the grounds which Atlantic asserts in support of its petition. Respondent, [Ellerman] asserts that the grounds urged by Atlantic do not in fact exist, although if certiorari should be granted upon the petition in No. 284 [*Ellerman v. Beard*] it may seem wise to the Court to examine all facets of the litigation. Atlantic's petition demonstrates inconsistency in answers by the jury to interrogatories upon Special Verdict [F. R. C. P. 49] but does not demonstrate harm to itself if the court below was right in the way it resolved the case of P. v. D1.

Petitioner's Argument That It Was Deprived of the Right of Trial by Jury Is Erroneous and Will Not Stand Analysis.

The main point attempted to be made by petitioner is addressed to the Seventh Amendment. Atlantic contends

that the Court of Appeals erred in holding that Ellerman [petitioner in No. 284; respondent here], was entitled to judgment for indemnity as a matter of law if Ellerman was liable to the original plaintiff, Beard [respondent in No. 284]. Atlantic says that this was a fact question which the jury had decided. We will demonstrate that it was not a fact question; that the jury did not decide it; and, as the Court of Appeals points out, the point upon which Atlantic was held liable to Ellerman was never submitted to the jury.

The case in its setting must be recalled. A longshoreman, injured upon a ship, had sued the shipowner. The shipowner impleaded the stevedoring company which employed the longshoreman. In the action of P. v. D1, the District Court charged the jury, in substance, that it could find in favor of P. upon any one of three theories which we will summarize as follows:[1]

1. The use of the hook-band method of discharging bales of cargo;

2. The failure of the ship's chief mate to stop the stevedore from using the hook-band method of discharge; or

3. Failing to discharge other cargo destined for another port but which remained in the ship at the time of this accident, i.e., the theory of conducting the work in a place which was unsafe.

With these three alternative hypotheses or theories of liability submitted to it, and under an instruction [we think erroneous—see petition in No. 284] which permitted a finding in favor of the plaintiff against Ellerman [D1], if the jury believed Ellerman negligent with respect to any one of the three, we can analyze this case in its setting.

When the District Court charged the jury with respect to the case of D1 v. D2 for indemnity, however, the possible

1. See similar statement in petition in No. 284, page 10.

liability of Atlantic for indemnity upon the third theory stated above was never submitted to the jury for its consideration. This portion of the charge of the court appears at page 172a of the record.[2]

It is perfectly plain from the language of the District Court in its charge to the jury that what was submitted for jury consideration in the case of D1 v. D2 was whether:

> ". . . that condition was *created by* Atlantic and Gulf Stevedores. That is your *criterion:* Did Atlantic and Gulf Stevedores *create the condition* which made Ellerman Lines and The City Line responsible to the plaintiff? There again you have to run the whole gamut of facts in the case. You will have to decide whether or not there was an unreasonable discharge of this cargo, *an unsafe method used in the discharging of this cargo, in the placing of the hook.*" [Emphasis ours.]

Thus it is clear that in the case of D1 v. D2, the District Court did not submit to the jury, and there is, therefore, no jury finding such as that which this petitioner seeks to persuade this Court is involved in this case.

We now proceed to an analysis of what the Court of Appeals did in its opinion. We think it erred in its attempt to reconcile the jury's findings for there was no way in which the court could have known which of the three theories the jury adopted in determining this respondent's liability to the original plaintiff. See petition in No. 284. The present petition points up [petition, page 11] some of the error which forms the basis of the petition in No. 284. However, the petitioner seeks to take full advantage of what it concedes is an inconsistent jury verdict.

The petitioner, Atlantic, was an independent contractor. Its compensation was at a set rate per ton for offloading cargo. The respondent, Ellerman, did not direct or select the method. In fact, Ellerman's mate protested the method

2. Appellant's Appendix in Court of Appeals, Printed in Green Cover.

adopted by the stevedore as dangerous. It was conceded and never contested that the method of discharging was exclusively Atlantic's.

If the jury found the method improper and based liability in favor of the original plaintiff upon the ground that Ellerman was negligent for *permitting* this method to be used, it is clear that the actor, Atlantic, employing the condemned method would be acting improperly for using it. The answer of the jury to one of the interrogatories found that Atlantic was not negligent and had not breached its contract by adopting the hook-band method of discharging. The Court of Appeals reasoned, that if the method Atlantic had adopted was safe and adequate, then the jury finding of negligence as to Ellerman could not have been predicated upon the concept that Ellerman permitted Atlantic to use the particular method of discharge.

The Court of Appeals reasoned that since the jury's answer to an interrogatory in favor of Atlantic indicated that Atlantic had not breached its obligation to perform its contract of "workmanlike service" by use of the hook-band method, then the finding by the same jury of negligence on the part of Ellerman could not have been the use by Atlantic of the hook-band method of discharging.

Having reached that point, it was *a fortiori* reasoning that Ellerman's negligence could not have been point No. 2 above, the failure of the ship's officer to stop the stevedore from using the hook-band method of discharging. Ellerman's negligence could not have consisted in its failure to stop Atlantic from using a proper method of discharge. The Court of Appeals reasoned that otherwise there would have been complete inconsistency within the jury's answer to the special interrogatories. It adopted this method of reconciling them. Inconsistency was not to be presumed.

The Court of Appeals, therefore, looked to the answer of the jury to interrogatory No. 4 finding that Atlantic had performed its contractual obligation. To the Court of Ap-

peals that necessarily implied that the hook-band method of discharge was a proper one and, therefore, Ellerman was not negligent for permitting its use. The same is true of the fact that the ship's mate did not stop the use of the hook-band method of discharge.

The Court of Appeals, refusing to find inconsistency in the jury verdict, assumed consistency. It, therefore, reasoned that the jury's finding in Ellerman's negligence had to be based upon the third proposition stated above, that Ellerman failed to use reasonable care to provide the plaintiff below with a place to work which was reasonably safe. This had to do with the presence of cargo in the hold which was destined for another port. That the District Judge had instructed the jury that this was a permissible ground for a finding against Ellerman is clear from its charge [R166a] and it is equally clear [R172a] that the District Court did not submit this ground to the jury as a possible basis for a finding in favor of Ellerman and against the present petitioner. The opinion of the Court of Appeals [R16a] carefully points out that the District Court committed error when "the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work . . ."

We think it thus plain that Atlantic's main point in support of its petition claiming that it had been deprived of the benefit of a jury finding is simply not sustained by the facts. Petitioner cannot claim that the jury finding covered all grounds when a reference to the charge by the trial judge to the jury demonstrates so clearly that the point in question was never in fact submitted to the jury for determination.

If, therefore, the basis of the finding of Ellerman's negligence was that it permitted work to be carried on in a place where the presence of other cargo made it dangerous to perform the work, it must be remembered that the person who actually carried on the work was Atlantic. This

ground of petitioner's liability to Ellerman for indemnity was never submitted to the jury and the jury never passed upon the "calling into play" doctrine of this Court's decision in *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 [1959] and other cases.

Thus it is clear that the decision which this petitioner seeks to have this Court review can be distilled down to the proposition that if it was negligence for Ellerman [shipowner] to permit petitioner [Atlantic] and its employee, Beard [the plaintiff below] to work in a place which was unsafe due to the presence of other cargo, *it was negligent breach of Atlantic's contract* with Ellerman for Atlantic *to proceed with the work in a place which was not safe.* After all, it was Atlantic, not Ellerman, who was the actor. It was Atlantic, not Ellerman, who was the expert. It was Atlantic which was obligated by its contract with Ellerman to perform the work of unloading so that it did not expose Ellerman to liability or bring into play by its operation a condition which would foreseeably visit liability in damages upon Ellerman. That is the import of a whole line of decisions by this Court.[3]

In *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, this Court cited with approval the Fourth Circuit's decision in *Cornec v. Baltimore & Ohio R. Co.*[4] There the late Chief Justice Parker said:

> ". . . The instrumentalities used for loading and the methods of work, however, are matters within the control of the contracting stevedore. In the absence of some showing that the master directed the use of negligent methods, expressly approved them, or consented to their use, we know of no principle upon which the stevedore can be absolved from liability to the vessel . . ."

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3. *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 [1955]; *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U. S. 563 [1958]; *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 [1959]; *Waterman S. S. Corp. v. Dugan & McNamara, Inc.*, 81 S. Ct. 200 [1960].

4. 48 F. 2d 497, cert. denied, 284 U. S. 621 [1931].

Atlantic appears to have a basic misconception as to the scope of a jury finding. It regards the case as if all that the jury found was a single answer to a single interrogatory exonerating Atlantic from contract breach by reason of the use of the hook-hand method of discharge. But Atlantic was a party to the entire trial and jury findings upon other points are still binding upon it even though the specific interrogatory addressed to the jury may involve the question of the negligence of another party to the lawsuit. In this connection it is worthwhile to examine the decision in *Crawford v. Pope & Talbot, Inc.*,[5] cited with approval by this Court in its opinion in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*[6] Particularly apt is the analysis made in the discussion in *Crawford* beginning at the bottom of page 793 of 206 F. 2d. The discussion in that case was as to the effect of finding upon one not a party, but here Atlantic was a party and cannot ignore the other jury findings in this case in which it participated.

Probably the thing which Atlantic's petition best demonstrates is that there was inconsistency in the jury findings particularly as they pertain to the case of P. v. D1. That only emphasizes that Ellerman's petition in No. 294 should be granted, for surely if the Court of Appeals could rationalize the inconsistent verdict and sustain the judgment in favor of the plaintiff as against Ellerman, then as a matter of law the court below was right in awarding Ellerman judgment against Atlantic and that holding is in no way inconsistent with any jury finding.

No New Point Is Presented by the Second Point in the Petition With Respect to Interpretation of a Written Contract.

We can dispose of Atlantic's second point briefly. It seeks to draw a distinction between the present case where there was a written contract and this Court's holdings in

5. 206 F. 2d 784 [1953].
6. 355 U. S. 563 at 568.

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.[7] and *American Stevedores, Inc. v. Porello.*[8] In so doing, Atlantic overlooks the important distinction between an implied contract and a term implied in a written contract.

It is to be noted that Atlantic does not make reference to the particular contract involved in the present case. An examination of it will show conclusively that this question is simply not covered. There is no language about which parties may argue their differing intents, such as in *American Stevedores, Inc. v. Porello.* Since the point is not covered, then the law, through decisions of this Court which we need not repeat here, has held that it is an implied term that the stevedore will perform his work "in a workmanlike manner" and refrain from conduct which will foreseeably visit liability upon the shipowner, the other party to the contract. Arguments similar to this have been addressed to courts before and have received clear and concise answer. We can do no better than to cite to this Court the decisions in *Read v. United States,* 201 F. 2d 758 [1953], commencing at the bottom of page 762, and the decision in *Olszczuk v. Calmar Steamship Corp.,* 164 F. Supp. 628 at 632, affirmed, *sub nom. Calmar Steamship Corp. v. Nacirema Operating Co.,* 266 F. 2d 79, cert. denied, 361 U. S. 816 [1959].

There Is No Conflict Among the Circuits Upon the Question of Shipowner's Right to Indemnity.

Commencing at page 23 of Atlantic's petition, it attempts to demonstrate conflict, but an examination of the cases upon which it relies fails to reveal conflict in fact. Its two main cases said to be in conflict with the decision below are *United States v. Harrison,* 245 F. 2d 911 [C. A. 9, 1957] and *Ameroccan Steamship Co. v. Copp,* 245 F. 2d 291 [C. A. 9, 1957].

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7. 350 U. S. 124 [1955].
8. 330 U. S. 446 [1947].

The short answer to the allegation of conflict as to the *Harrison* case is to read the terms of the contract there involved which are reproduced at page 913 of 245 F. 2d. If the contract between Ellerman and Atlantic in the case at bar had contained similar provisions it might well be that the present case would have had a different result. In the absence of contractual language such as was before the court in the *Harrison* case, there is no conflict and nothing that even approaches a conflict with the decision in the instant case.

Amerocean Steamship Co. v. Copp is likewise distinguishable. It was not a "calling into play" situation such as we have in the case at bar. Rather [245 F. 2d at 294] the finding of the trial court was that the joint acts of negligence of D1 and D2 brought about injury. The court, therefore, applied this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 [1952] and denied the shipowner recovery. That is quite a different situation on its facts than the present case.

CONCLUSION.

Atlantic's long and almost emotional petition destroys only a paper tiger of its own creation. We think it manifest that if the Court of Appeals could legitimately reconcile apparent inconsistency in the jury's answers to interrogatories and could hold Ellerman liable to the plaintiff, then the judgment for indemnity followed under principles clearly established by authoritative decisions of this Court.

In closing we make one other observation. At trial the charge of the court submitted the case to the jury under three possible theories of the liability of Ellerman, but submitted the case of Atlantic's liability to indemnify Ellerman only under the so-called "hook-band" method of discharging. As the Court of Appeals points out [R16a]:

> ". . . the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on

the discharging operation in an unsafe place to work . . . ."

Ellerman took exception to this. Where a case is tried upon a Special Verdict, F. R. C. P. 49 controls. It clearly provides that if in submitting interrogatories to the jury the court omits an issue, "each party waives his right to a trial by jury of the issue so omitted . . ." Atlantic waived; Ellerman did not.

It is, therefore, a matter of semantics whether the Court of Appeals, considering the indemnity phase of the case only, pointed out to the District Court that it should have granted binding instructions to the jury upon this point and then remanded the case to the District Court for the entry of judgment in accordance with the Circuit Court's opinion or whether the Court of Appeals directed the entry of judgment. In either case the result would be the same and Atlantic has no just cause for complaint which would require review by this Court of this portion of the case.

Unless this Court grants certiorari in the petition in No. 284 and then determines that it desires to have all phases of this case before it, there is no ground for granting the petition of Atlantic alone, and it should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 282.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD., AND
THE CITY LINE, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION OF THE COURTS BELOW.

The District Court did not file an opinion. The opinion of the Court of Appeals for the Third Circuit is recorded in 289 F. 2d 201 (R. 217). The Court of Appeals for the Third Circuit did not file an opinion denying the petition for hearing of Atlantic and Gulf Stevedores, Inc.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1961 (R. 231). The Order denying the Petition for rehearing was entered on May 31, 1961 (R. 232). The petition for Writ of Certiorari of Atlantic & Gulf Stevedores, Inc., was granted on October 16, 1961 (R. 233). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. C. Constitution Amendment VII—Civil Trials.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

QUESTIONS PRESENTED.

No. 1. In a suit by a shipowner claiming indemnity from a stevedoring contractor is not the reversal of a judgment founded on a special verdict of the jury clearly supported by the evidence that a stevedoring contractor was not negligent or in breach of its contractual obligations, there being no rule of law making such finding by the jury improper, a re-examination of facts tried by a Jury otherwise than according to the rules of the Common Law and as such a violation of the Seventh Amendment of the Constitution of the United States?

No. 2. Where a shipowner and a stevedoring contractor enter into a written contract which expressly defines the obligation of each, and a Jury's special verdict, supported by the evidence acquits the stevedore of any failure to do its work in accordance with the contractual obligation is it not error for an Appellate Court to set aside the factual finding of the Jury and reverse a judgment entered upon such verdict on the ground that the stevedore, as a matter of law, breached its warranty to perform the obligations of the contract with reasonable safety?

No. 3. Where the verdict of a jury is based upon substantial and competent evidence, and the Trial Court's charge encompassed all of the issues raised by the pleadings, proofs and the contractual obligations of the parties, may the Court of Appeals reverse such verdict without a holding or showing that the special verdict of the jury is clearly erroneous?

STATEMENT OF THE CASE.

Leighton Beard, resident and citizen of Pennsylvania, brought this civil action, founded upon the diversity jurisdiction of the District Court against Ellerman Lines, Ltd. and The City Line, Ltd., British corporations, hereinafter referred to as "Ellerman", to recover damages for serious injuries sustained in the course of discharging bales of burlap from the latter's vessel, S. S. "City of Calcutta". The accident occurred July 1, 1955. Beard, a longshoreman, was employed by Atlantic & Gulf Stevedores, Inc., hereinafter referred to as "Atlantic", a concern engaged in stevedoring services for Ellerman.

Beard's complaint against Ellerman alleged that the latter's vessel was unseaworthy and that Ellerman was negligent. Ellerman impleaded Atlantic as a third-party defendant alleging that Beard's injuries resulted from Atlantic's failure to properly perform the work of unloading the cargo, using a negligent manner to unload the cargo, using devices that were dangerous, improper and in violation of its agreement with Ellerman (R. 11a). Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The undisputed facts indicate that the bales of burlap had been loaded in India. The bales in question weighed approximately eleven hundred pounds, measuring two feet by three feet by four feet and were stowed in the lower 'tween deck of the number one hatch of the Ellerman vessel, the "S. S. City of Calcutta" (R. 2b). Atlantic played no part in the loading or stowage of this cargo.

There were sixty-three tons of New York bales in the forward end of the hold extending out halfway into the square of the hatch, adjoining one hundred tons of Philadelphia bales of burlap stowed to an equal height and extending to the after end of the hold (R. 109b). Though the vessel arrived from New York, no evidence was offered to explain why the New York bales had not been discharged.

The bales were tightly bound by four parallel one-inch bands, each bale containing thirty to forty bolts of burlap and were tightly stowed in layers on tiers.

The discharging operation consisted of pulling the bales from their tightly stowed position to the square of the hatch by winches and raising them vertically out of the vessel and on to the pier. This was accomplished by use of a ring to which six equal length ropes were attached. A large flat-end hook on the end of each rope was inserted under the metal bands which compressed the bales, using two hooks per bale (R. 2b). Three bales were thus raised together. Beard and his fellow longshoremen would then signal the winch operator to pull the bales from their stow to the hatch square, and after overcoming side-sway, the bales would be raised vertically. The holdmen would then seek shelter away from the square of the hatch protected by the coaming. After about three hours of such operation, two tiers of the Philadelphia bales had been removed. As a draft of three bales was being lifted out of the hatch to a height of approximately thirty feet, in a vertical lift, the two bands of one bale broke, causing the bale to fall. It struck the New York cargo and bounded in the direction of Beard, pinning him against the after bulkhead and causing injuries which necessitated the amputation of his right leg above the knee (18b, 25b, 30b). No other bales were known to have fallen while being lifted vertically prior to the accident in question or during the years of experience of any of the witnesses or experts who testified in the case.

The case was tried before the Honorable Chief Judge J. Cullen Ganey and a jury. After ten days of trial the issues were presented to the jury upon five interrogatories, phrased after much discussion in a form agreed upon by counsel (185b-215b). After deliberation, the jury returned with the following answers to interrogatories (187a-189a):

1. Was unseaworthiness a substantial factor in causing the injuries to the Plaintiff?
   Yes.

2. Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the Plaintiff?
Yes.

3. In what amount, if any did you assess the damages to be awarded the Plaintiff?
$100,000.00.

4. If you have answered "yes" to interrogatories 1 and 2 did the fault of Ellerman Lines, Ltd., and the City Line, Ltd. arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation?
No.

5. If you have answered "yes" to interrogatory No. 4, was Atlantic and Gulf Stevedores, Inc.'s breach of this contract a substantial factor in bringing about the injuries to the Plaintiff?
No.

The District Court entered judgment on the special findings of the jury in favor of Beard against Ellerman and in favor of Atlantic upon Ellerman's claim for indemnity. Ellerman's motions for judgment n.o.v. or for a new trial, were denied on April 4, 1960 without opinion and Ellerman appealed to the Court of Appeals for the Third Circuit. On April 7, 1961 the Court of Appeals for the Third Circuit affirmed the judgment in favor of Beard and against Ellerman, but reversed the finding of the jury and the judgment in favor of Atlantic upon the reasoning that if the jury based its finding of negligence against Ellerman for improperly stowing the New York cargo adjoining the Philadelphia cargo thus creating an unsafe place to work, it was equally negligent for Atlantic to handle the cargo. The Court erroneously found that the District Court had limited the sole criterion of the jury's test as to whether Atlantic had breached its contract of work-

manlike service, to the use of the bale hook method alone and, without regard to whether the discharge operation was conducted in an unsafe place. The charge demonstrates that the District Court did not so limit the jury's test (R. 171a, 172a, 173a).

The Court of Appeals found as a matter of law that Atlantic was liable to Ellerman for indemnity for breach of its warranty to perform the obligations of the contract with reasonable safety. The issue of unseaworthiness was not considered by that Court.

Petitioner moved for rehearing upon the grounds that the weight of the evidence supported the jury's verdict,[1] that no evidence was presented to support the conclusion that Atlantic was negligent as a matter of law, that the action of the Court was in violation of the Seventh Amendment to the Constitution and that the Court erred in holding Atlantic liable as a matter of law notwithstanding that the jury found no breach of Atlantic's written contract. Petitioner further contended that the Court erred in con-

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1. The great weight of the evidence was to the effect that the method being used by the Petitioner was the established method of discharging bales of burlap (R. 43a, 7b, 23b, 39b, 43b-44b, 59b, 73b, 75b-76b, 83b-84b, 105b, 120b, 123b); the method prescribed by the safety rules for cargo operations (R. 49b); the only method used on the vessels of the shipowner in the port of Philadelphia (R. 19b, 23b, 68b, 70b, 167b); the same method used on double bales weighing 1700 pounds each (R. 114b, 120b-121b); the only practicable method (R. 83b, 123b).

None of the witnesses had ever seen bands break causing a bale to fall while the draft was hoisted out in a straight lift (R. 14b, 22b, 123b, 134b). The method was regarded by the experts as "usual and customary" and as a "safe method" (R. 123b); described as a "safe method of unloading this cargo" (R. 59b); "safest customary method" (R. 84b). The longshoremen had never seen bands break during the vertical lift except at the time of the accident in question (R. 14b, 38b). An expert who made scientific tests on bands identical with those in use at the time of the accident testified that the method of discharge used by Atlantic and Gulf is perfectly safe for unloading bales which weigh 1,000 to approximately 1,400 pounds" (R. 160b). His tests established a safety factor of 7.7 to 1 when two bands were used in lifting the bales (R. 160b-161b).

cluding that the District Court failed to submit to the jury the issue of "unsafe place to work" since the instructions to the jury encompassed all of the issues raised in the pleadings, during the trial and the terms of the contract which was offered in evidence.

The Court of Appeals denied the Petition for a rehearing without opinion.

SUMMARY OF ARGUMENT.

A. In the trial court, the jury found specifically that the petitioner had not breached its contractual obligation and that the fault of the shipowner did not arise out of any failure of petitioner to do its work in accordance with the contractual obligation. The Court of Appeals reversed this finding of the jury and held that the finding of negligence as to the defendant shipowner required a corollary finding that the petitioner was also negligent, and hence held petitioner liable to respondent, by way of indemnity, for the same negligence which made respondent liable to plaintiff. The finding of the jury that petitioner had not breached its contractual obligation and that the shipowner's liability did not arise out of any failure of petitioner to do its work in accordance with the contractual obligation was amply supported by the evidence. There was no rule of law making such a finding of the jury improper. The finding of the jury was resolved under appropriate instructions of the Court.

It is submitted that under the circumstances, the Court of Appeals violated the provisions of the Seventh Amendment of the Constitution of the United States providing that "no fact tried by a jury should be otherwise reexamined in any court of the United States, than according to the rules of common law." An appellate court may not *redetermine* a fact properly submitted, and found by a jury, which is supported by the evidence and substitute its own conclusion or finding of fact. Such a procedure denies to the party a trial by jury as guaranteed by the Seventh Amendment and violates the interdict of the last part of the Amendment.

Disregarding its obligation to accept the jury's findings sustained by the evidence, as such findings related to the question of breach of contract, the Court of Appeals equated the negligence of respondent as determined by its duty to plaintiff with the obligations owing by petitioner to re-

spondent under the written contract and held petitioner liable to respondent for the same negligence. This was clearly error, since petitioner was not liable to plaintiff for anything it did, so long as it met its obligation to plaintiff under the Longshoremen's Act (33 U. S. C. Sec. 901, et seq.). The question of petitioner's compliance with the contractual obligation was clearly a factual question for the jury and its finding could not be disturbed unless clearly erroneous.

Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable: *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. 2 142; *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32, 32.

The record demonstrates that the findings of the jury were not clearly erroneous and the Court of Appeals erred in reversing them in violation of the provisions of the Seventh Amendment.

B. The contract of the parties in the instant case contained no language expressly agreeing to indemnify respondent for damages paid by it, because of injuries to persons, under any circumstances. It merely provided that petitioner would do its work "with every care and due dispatch to the satisfaction of the respondent". It did its work under the watchful eye of respondent's chief mate who had authority to stop the stevedore's operations but chose not to do so (R. 220).

The trial judge told the jury that the whole contract should be adverted to and instructed the jury to determine whether *any* breach of the contract occurred (R. 171a). Imposing even a greater burden than the contract, it asked the jury to decide whether petitioner breached its contract to do its work "in a workmanlike manner *with the utmost care*" (R. 172a) and whether "there was a substandard performance in which there was foreseeability that injury

might occur to someone in the breach of that contract" (171a, 172a). The jury found in answer to an interrogatory that the fault of the shipowner for which it was found liable to the plaintiff did not arise out of any failure on the part of petitioner to do its work in accordance with the contractual obligation (R. 188a).

Under these facts and findings it is submitted that the Court of Appeals erred in deciding that the "testimony adduced afforded ample basis for a jury finding that the discharge of the Philadelphia cargo was carried on in an unsafe place to work and while that finding made Ellerman liable to Beard, *it also made Atlantic liable as a matter of law, to Ellerman for indemnity* for its breach of warranty as previously detailed" (R. 229) (Emphasis supplied).

We have already indicated that the Court could not reverse the jury's finding under the evidence, without violating the Seventh Amendment. We assert in the sections of our brief now being summarized that under the facts presented by the evidence and the findings of the jury (187a-189a), nothing short of a contract, agreeing to hold the shipowner harmless or indemnifying the shipowner against its own independent negligence and expressly accepting liability to petitioner's employees caused by the shipowner's acts in creating or causing an unseaworthy condition could be held to impose such absolute liability on the petitioner. Since no such contract existed, the effect of the decision below was to create such absolute liability on the part of the stevedore who enters into *any* agreement no matter how carefully the language of the agreement is drawn to limit an obligation of indemnity or foreclose it entirely.

Such holding is directly contrary to the holdings of this court in *Porello*, (330 U. S. 446, 91 L. Ed. 1011) and *Weyerhaeuser*, (335 U. S. 563, 2 L. Ed. 2, 491) since each of these cases require a reference to the contract to determine, as a matter of fact, the scope of the stevedore's undertaking relating to indemnity and *Weyerhaeuser* requires an additional factual inquiry into whether the shipowner was

itself guilty of conduct which would preclude recovery even where the obligation to indemnify is undertaken.

It is submitted that the best considered cases in the Circuits insist that these questions, consistently with the holding in *Porello* and *Weyerhaeuser*, must be determined by the jury. *McNamara*, 293 F. 2d 900, *Mathews*, 182 F. 2d 322, *Slattery*, 186 F. 2d 134, *Brown*, 211 F. 2d 16, *Hodgson*, 294 F. 2d 32, *Harrison*, 245 F. 2d 911, *Reddick*, 258 F. 2d 297.

We submit further that nothing said by this Court in *Ryan*, 350 U. S. 141, *Weyerhaeuser*, 355 U. S. 563, *Crumady*, 358 U. S. 423 or *Waterman*, 364 U. S. 421 changes this requirement or compels the determination that respondent is entitled to indemnity from petitioner as a matter of law under the particular facts of this case and the jury's findings.

We assert instead that neither the decision in the *Ryan* case nor any case involving similar issues since that decision was intended to undermine the limited liability set forth in the Longshoremen's Act or to announce as a principle of law that, without regard to the terms of the contract involved, a stevedore undertakes an absolute liability for such indemnity merely because it agrees to do the job. We submit *Weyerhaeuser* makes it clear that this is not intended by the cases decided by this Court and that on the contrary *Weyerhaeuser* makes it clear that in the *presence* of a written contract, the terms of the writing must be considered and will control.

We suggest that the holding of the Court of Appeals in the instant case thwarts entirely the import of the limited liability of a stevedore which the Longshoremen's Act was deliberately designed to afford except where the stevedore, by some contract, specifically and voluntarily assumes a consensual obligation to indemnify or burdens beyond those imposed by the Act.

We urge the application of principles of interpretation to our contract which are applicable to indemnity agree-

ments generally and cite authority that such contracts must express a clear intention by unequivocal language to impose a loss upon an indemnitor and that this rule is particularly true if one seeks to be indemnified against his own negligence, which has been found by a jury to be a substantial factor in causing the injuries of the original plaintiff.

The Court of Appeals in the instant case disregards the mandate of *Porello* and *Weyerhaeuser*, gives no consideration to and makes no reference to the contract between the parties and ignores the fact that it is bound by the jury's finding specifically exculpating petitioner of any breach of its contractual obligation or of any negligence in "handling" cargo in an unsafe place, after a full consideration of the facts and the contract under a full and proper charge of the Trial Court.

To hold that a stevedore may be liable as an indemnitor for the liability of a shipowner caused by the shipowner's negligence and conditions committed and existing at the time of the application of the contract and merely for working under such conditions or for the interaction of such conditions, equipment or stowage which the Petitioner did not control and had no contractual duty to supply, repair, correct or control, is to make of the stevedore an absolute guarantor and to create a contractual indemnity far beyond the compass of the agreement actually made and here involved.

The issues involved herein are of national importance to the stevedoring and shipping industry. The decision of the Court of Appeals is a major departure from the rulings made by this Court and if allowed to stand will create further disharmony in the uniform application of the doctrines enunciated by this Court.

This decision is a sharp erosion of the Constitutional mandate that "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." Unless this decision is reversed, further erosion of the mandate will surely follow.

ARGUMENT.

I.

The Decision of the Court Below Reversing a Judgment Entered Upon the Unanimous Verdict of a Jury Violates the Provisions of the Seventh Amendment to the Constitution of the United States Which Provides That "No Fact Tried by a Jury, Shall Be Otherwise Re-Examined in Any Court of the United States, Than According to the Rules of the Common Law," There Being No Rule of Law Making Such a Finding by the Jury Improper.

The decision of the Court of Appeals in the instant case reversing the unanimous verdict of impartial jurors was a capricious and unreasonable action directly contrary to the provisions of the Seventh Amendment to the Constitution of the United States. The decision marks another step in the gradual erosion which has unfortunately worn away part of the essential guarantee of the Seventh Amendment.

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (Emphasis added.)

The amendment has for its primary purpose the preservation of "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under

appropriate instructions of the Court": *Baltimore & C. Line v. Redman*, 295 U. S. 654, 657 (1935); *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U. S. 494, 497-499 (1931); *Dimick v. Scheidt*, 293 U. S. 474, 476, 485-86 (1935).

The aim of the amendment to preserve the historic line separating the province of the jury from that of the judge, still permitted procedural improvements which did not transgress this line. (See Constitution of United States, Revised and Annotated 1952 Senate Document No. 170 82nd Congress 2nd Session p. 895 for illustrations of this development.)

The only modes known to the common law to re-examine such facts as are properly tried by a jury are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings: *Parsons v. Bedford*, 3 Pet. 447, 7 L. Ed. 732.

Prior to the enactment of Rule of Civil Procedure 50, 28 U. S. C. A. federal courts did not have the right even where the evidence was insufficient as a matter of law to do anything more than grant a new trial. Rule 50(b) was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It merely renders unnecessary a request for reservation of the question of law or a formal reservation and in addition it regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. "It adds nothing of substance to rights of litigants heretofore existing through a more cumbersome procedure: *Montgomery Ward v. Duncan*, 311 U. S. 230; *Berry v. United States*, 312 U. S. 450. In the latter case (312 U. S. p. 452) this Court said:

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested

issues of fact a jury being the constitutional tribunal provided for trying facts in courts of law."

A trial court may not now and has never had the right pursuant to the Constitution of the United States to *predetermine* an essential fact. An appellate court may not now and has never had the right to *redetermine* a fact properly submitted and found by the jury which is sustainable by the testimony *and substitute its own conclusion or finding of fact.* Such a procedure clearly denies the party a trial by jury guaranteed by the Seventh Amendment and violates the interdict of the last part of the amendment which requires that no fact be re-examined once found by a jury except in accordance with the common law: *U. S. v. Alfred Mansueak*, 234 F. 2d 421; *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350; *Liberty Mutual Insurance Company v. Thompson*, 171 F. 2d 723 (C. C. A. 5th 1948); *Curtis v. A. Garcia Y Cia*, 272 F. 2d 235, 238 (C. C. A. 3rd 1959).

In our case, the Court of Appeals was wholly indifferent to the established basis upon which powers have been allocated between the court or jury and was beguiled into rejection of a view of the facts which seemed to it less reasonable than its own view, a violation of Petitioner's constitutional rights, which cannot be condoned.

In submitting the issues to the jury the District Court Judge under clear and proper instructions (see this Brief p. 39) let the jury decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge thereof and asked it to relate its findings to the special interrogatory No. 4 which asked it to state whether the fault of Ellerman arose out of any failure on the part of the Petitioner to do its work in accordance with the contractual obligations between it and the shipowner. The jury answered this latter interrogatory (R. 187a, 189a) in the negative having first stated in response to interrogatories Nos. 1 and 2 respectively that unseaworthiness was a

substantial factor in causing the injuries to the plaintiff and that negligence on the part of Ellerman was a substantial factor in causing injuries to the plaintiff (R. 188a). Despite these clear factual findings the Court of Appeals found (R. 227): "Thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in the unsafe place to work." The jury had made a completely contrary factual finding and even if its finding in the Court's view was erroneous under the facts, there being sufficient evidence to sustain its finding, the Court could not *substitute* its own finding in order to reverse.

It is submitted that to justify a reversal and a direction to find against Petitioner there would first have to be an insufficiency of testimony to support the specific finding of the jury or a basic error of law as to how its finding once made should be applied.

The Court of Appeals had itself noted the distinction between the jury's answer to interrogatory No. 2 (in which it held Ellerman negligent) and its answer to interrogatory No. 4 (in which Petitioner was absolved from liability over to Ellerman) by saying (R. 225):

> "In answering Interrogatory No. 2 the jury was determining *the issue of negligence* between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the *contractual obligation* of Atlantic to Ellerman."

The fact is however that while Ellerman was liable to Beard for negligence, the Petitioner was not liable to Beard for anything it did, so long as it met its absolute obligations to Beard under the Longshoremen's and Harbor Workers' Act (33 U. S. C. Sec. 901 et seq.).

Petitioner's contractual liability to Ellerman for indemnity involved a consideration of the terms of the contract: *Weyerhaeuser SS Co. v. Nacirema Co.*, 355 U. S.

563. The contract and its terms however were neither referred to, reviewed nor construed by the Court of Appeals.

Disregarding completely its obligation to accept the jury's findings where sustainable by the evidence, as such findings related to the question of breach of the contract, the Court of Appeals merely equated the negligence of Ellerman as determined by its duty to Beard with the obligations owing by Petitioner to Ellerman solely by reason of the written contract, and held Petitioner liable to Ellerman for the *same* negligence which made Ellerman liable to Beard, the plaintiff.

The Court of Appeals points out that "the record affords ample basis for a jury fact finding that (1) use of the bale hook method in the discharge of burlap bales constituted negligence and (2) that the injured longshoreman was not afforded a safe place to work" (R. 227).

But despite the fact that the record afforded a basis for such findings, *these findings were not made as to the Petitioner*, although the charge of the court left to the jury "whether there was a sub-standard performance in which there was foreseeability that injury might occur to someone in the breach of that contract . . ."

The District Court specifically posed to the jury the questions (R. 172a):

> "Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and the City Line responsible to the plaintiff? . . . Did they breach that contract to do it in a workmanlike manner with the *utmost* care? . . . In other words did the liability of the Ellerman Lines Limited and the City Line Limited arise out of *any* failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?" (Emphasis supplied.)

The jury said "*no*" to all of these questions by its answer to interrogatory No. 4.

As was well stated by Mr. Justice Lamar in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417:

> "The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court."

The courts are constantly urged in cases of this character to substitute their judgment for that of the jury on questions of fact. The seductive argument is made that a conclusion of fact which appears by the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it means that the courts are substituting their judgment for that of the jury on fact questions in violation of constitutional requirements: *Burcham v. J. P. Stevens Co.*, 209 F. 2d 35.

The question in the instant case, whether the Petitioner had complied with its contractual obligation that "*All the work shall be done with every care and due dispatch to the satisfaction of the party of the first part.* (shipowner)" (R. 148a) was clearly a factual question for the jury.

Most recently in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. (2) 142, 80 S. Ct. 173, Mr. Justice Brennan delivering the opinion of the Court in a case involving a factual determination by a jury under the Jones Act, stated that:

> "*The members of the jury, not the medical witnesses were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration.* . . . The focal point of judicial review is the reasonableness of the particular reference or conclusion drawn by the jury . . . The very essence of its (the jury's) function is to select from among conflicting references and conclusions that which it considers most reasonable . . . *Courts are*

> ***not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*** Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 NCCA U. S. 647. See Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 1 L. Ed. (2) 493, 77 S. Ct. 443." (Emphasis supplied.)

In the instant case, the finding of negligence by the jury as to the defendant shipowner did not require *as a matter of law* a corollary finding that the stevedore was also negligent. The facts in evidence[2] justify a contrary finding and the Court of Appeals could not reverse it by suggesting that it was required as a matter of law.

In *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where as here there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable:"

See also *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353; *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. Ed. 490.

Indeed in two cases dealing essentially with the issues involved in this case, the Court of Appeals for the Third Circuit has met the issue in conformity with the requirements of the Seventh Amendment. Most recently in *Hodg-*

2. See footnote 1 (P. 6 of this brief).

son v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32, the jury in answer to a special interrogatory, found that the shipowner was not guilty of negligence but based upon a finding of unseaworthiness, made an award in favor of Hodgson against it. The shipowner argued on appeal that judgment rendered against it in the third party proceedings for indemnity must be reversed as a matter of law despite a jury finding that the stevedoring company had performed its services in a "workmanlike, safe and proper manner". The Court of Appeals said:

> "The shipowner forgets that an appellate court will not interfere with a judgment entered on a verdict returned by a jury simply because of its opinion as to the weight or preponderance of the evidence. Liberty Mutual Insurance Co. v. Thompson, 171 F. (2d) 723 (C. A. 5 1948); Harnick v. Lilley, 167 F. (2d) 159 (C. A. 8 1948); 5 Moore's Federal Practice Sec. 38.08 (5 p. 89)."

In the latter decision the Court referred to its own decision in *Hagans v. Farrell Lines, Inc.,* 237 F. 2d 477 (1956) where, in an opinion written by Judge Kalodner, the court felt bound by the jury's finding and specifically referred to *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.,* 355 U. S. 563, saying:

> "Whether the stevedoring company's conduct constituted a breach of the provision (of the agreement) was, of course, a question of fact for the jury."

The specific holdings in *Hagans* and *Hodgson,* referred to above, make the action of the Court of Appeals in this case the more startling. The jury was thus justified in finding that the fault of the shipowner did not "arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation" (188a).

The Appellate Court must resolve all conflicts in the evidence in favor of the party against whom the judgment is sought and reject any evidence to the contrary. *Downing v. Union Paving Co.*, 184 F. 2d 481 (C. C. A. 3rd 1949); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944); rehearing denied, 321 U. S. 802; *Sentilles v. Inter-Caribbean Shipping Corp.*, 80 S. Ct. 173, 361 U. S. 107 (1959).

The application of the standard of appellate review expressed by this Honorable Court in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6 was disregarded by the Court of Appeals. In the *McAllister* case the court said (U. S. pp. 20-21, L. Ed. p. 24):

> "In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The question therefore, is whether the findings of the District Court are *clearly erroneous.*" (Emphasis supplied.)

Applying this standard to the present case the Court of Appeals could reverse the judgment in favor of Atlantic only if the jury's findings were clearly erroneous. The record demonstrates that the findings of the jury were *not* "clearly erroneous" and the Court of Appeals erred in reversing them in violation of the provisions of the Seventh Amendment. Upon this ground alone, the decision of the court below should be reversed, and the Judgment in the District Court reinstated.

II.

The Decision of the Court Below Is in Conflict With the Rule Laid Down in the Decisions of the Supreme Court in American Stevedores, Inc. v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847, and Weyerhaeuser Steamship Co. v. Nacirema, 355 U. S. 563, 2 L. Ed. 491, 78 S. Ct. 438 (1958) Which Hold That in the Presence of a Written Contract All Fact Issues Involved in the Third Party Action, Including the Intention of the Parties to Such Writing, the Extent, Scope and Application of the Contractual Obligations Between the Shipowner and Stevedore, and Whether They Were Breached Are Issues to Be Decided by the Jury.

The decision of the Court below in the instant case is directly in conflict with the decisions of this Court in *American Stevedores, Inc. v. Porello*, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847 and *Weyerhaeuser Steamship Co. v. Nacirema*, 355 U. S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958).

There has been a considerable disagreement among other Courts about this Court's holdings in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099, 66 S. Ct. 872; *Halcyon Lines v. Haenn Shipcoiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277; *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202; *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 141; *Weyerhaeuser Steamship Co. v. Nacirema Steamship Co.*, 355 U. S. 563 (1958); and *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423.

The active area of litigation involving suits for indemnity and so-called "contribution" by vessel owners against independent stevedoring contractors set the stage for this group of decisions by this Court extending the warranty of seaworthiness to a class of workers which had consistently been regarded as strangers to the rigors inherent in the work of those who went down to the sea in

ships. Thus, in 1946, in *Seas Shipping Company v. Sieracki*, (*supra*) the Supreme Court of the United States initiated this unprecedented course by holding that longshoremen were entitled to the warranty of seaworthiness. In *Halcyon Lines v. Haenn Shipceiling & Refitting Corp.*, (*supra*) (1952) this Court determined that the vessel could not seek contribution from an independent stevedoring contractor as an avenue to insulate its new and judicially acquired exposure. In *Pope & Talbot, Inc. v. Hawn*, (*supra*) (1953) this Court further extended the warranty of seaworthiness to cover a carpenter who was temporarily working aboard ship.

In 1956, this Court developed relief for the vessel by way of indemnity in the landmark decision of *Ryan Stevedoring Company v. Pan Atlantic Steamship Corp.*, (*supra*) wherein this Court held that the provisions of Section 5 of the Longshoremen's and Harborworkers' Compensation Act, 33 U. S. C. 905, did not act as a bar to the shipowner's asserted right to recover indemnity. The rationale behind the Court's holding on this point can best be summarized in these words from the opinion:

> "While the compensation act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee the contractor had no logical ground for relief from the full consequences of its *independent contractual obligation, voluntarily assumed to the shipowner to load the cargo properly*. . . ."
>
> ". . . The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employees. *The Third-Party Complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner.* Accordingly, the shipowner's action for indemnity on that

basis is not barred by the compensation act". (Emphasis supplied.) (350 U. S. 131, 100 L. Ed. 140, 76 S. Ct. 239.)

The Court clearly indicated that the decision would be based on contractual principles and expressly refused to meet the question on common law indemnity principles:

"Because respondent in the instant case relies entirely upon Petitioners contractual obligation, we do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The Court reasoned that Ryan having agreed to perform *all* of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded, of necessity agreed to stow the cargo properly and safely and that failure to do so was in effect a violation of the very essence of the stevedoring contract. The Court stated that the stevedore owed to the shipowners a *"warranty of workmanlike service"* which the Court compared to a manufacturer's warranty of soundness of its manufactured product. The Court rejected the theory that the shipowner's duty to supervise the stowage and right to reject unsafe stowage, would preclude it from recovering indemnity. There is nothing in the opinion of any Court considering the *Ryan* case to indicate that it was ever urged or proved that the vessel had *actual knowledge* of the condition resulting in injury to the longshoreman. Instead the Courts considering the *Ryan* case viewed the fault of the vessel as arising from the fact that the vessel *failed* to *discover and should have known of the improper stowage. Clearly in Ryan the vessel owner had no actual knowledge of the defects and its failure was merely one to inspect and discover the defect.*

In the *Ryan* case there was a direct service agreement and a finding that the injuries were sustained as a result

of the stevedore's breach of warranty to perform the obligations of the contract with reasonable safety. Thus the Court did not reach the issue of the exclusionary effect of the Compensation Act under a right of action of a shipowner under comparable conditions without reliance upon an indemnity or service agreement of a stevedoring contractor. In that case the Third-Party Complaint was grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner, the contractor having assumed the entire duty of the shipowner. It was accordingly held that the shipowner's action for indemnity was on that basis not barred by the Compensation Act.

Where however no such consensual obligation was expressly assumed by the contractual arrangement, and the entire duty of the shipowner had not been assumed, and the shipowner had actual knowledge of the conditions, as in the case at bar, or if a contract cannot be read to lay the groundwork for such a consensual assumption, there can be no action of indemnity: *Brown v. American Hawaiian S. S. Co.*, 211 F. 2d 16 (3rd Cir. 1954). The Court of Appeals there repeated what it thought it had made clear in the case of *Crawford v. Pope & Talbot, Inc.* (206 F. 2d 758):

> "There can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. *Pope & Talbot v. Hawaii*, 346 U. S. 406, 412, 74 S. Ct. 202."

The contractual nature of the shipowner's claim has been properly pointed up in both *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 and in *Read v. United States*, 201 F. 2d 758 in the Third Circuit and in *American Mut. Liability Ins. Co. v. Matthews*, 182 F. 2d 322 and in *Slattery v. Marra Bros.*, 186 F. 2d 134 in the Second Circuit.

In *Matthews* the claim was for contribution but in denying it the Court relied upon indemnity cases and rested the result squarely on the effect of the contractual relationship between the parties. The Court there said:

> "In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. *To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable. Hence we can find no contractual basis for indemnity or contribution.* To impose a non-contractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited liability to secure compensation to his employees". (Emphasis in part supplied.)

In *Slattery v. Marra*, (*supra*) the Court repeated that the shipowner in seeking indemnity could rely only upon a breach of contract.

After *Matthews* and *Slattery*, the Third Circuit adopted the same view in the *Crawford* and *Read* cases and dispelled any doubt as to its position in the case of *Brown v. American Hawaiian S. S. Co.* referred to above.

Thus, in the Second and Third Circuit, the cases noted, notwithstanding the difference in emphasis made the existence of a contractual or other relational duty *running from the employer to the shipowner and a breach thereof* an indispensable condition to indemnity.

In the case at bar the jury found specifically and on ample evidence that the Petitioner had done its work in accordance with the contractual obligation and that no such breach was a substantial factor in bringing about the injuries to the Plaintiff (R. 188a). They had been asked to specifically decide whether there was any breach to perform the contract in a workmanlike manner with the *utmost* care and whether the liability of the shipowner arose out of *any* failure on the part of Petitioner to do its work in accordance with the contractual obligations (R. 172a). The Jury clearly and specifically decided that there was no breach and that the work undertaken had been performed in a workmanlike manner with the care required.

This Court again considered the indemnity question in *Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*, (*supra*). In that case, a winch shelter built in New York by the stevedore was permitted to remain while the ship proceeded to and arrived at Boston. There, the shelter was not inspected by either the stevedore or the ship's crew until the injury which occurred some five days after the arrival of the vessel in Boston. The case was tried to a jury with the judge *reserving submission* of the third-party action until he received the verdict on the main suit. The jury was charged as to both seaworthiness and negligence and returned a verdict in favor of the Plaintiff on the negligence cause of action *and in favor of* the vessel on the unseaworthiness count (236 F. 2d 349). After receiving the verdict for the Plaintiff in the main case, *the trial court directed a verdict in favor of the stevedoring contract against the vessel on the indemnity action.* The Court of Appeals affirmed the directed verdict. The Supreme Court of the United States in a unanimous opinion

reversed the Second Circuit and remanded the case for a new trial, holding that it was error for the trial court to direct a verdict in favor of the stevedore *and that the issues relating to indemnity should have been submitted to the jury.* The Court goes on to enunciate a principle, without clarification, that may well be the critical factor in indemnity actions (355 U. S. 567, 2 L. Ed. 2d 494, 78 S. Ct. 442):

> "If in this regard respondent rendered a substandard performance which lead to foreseeable liability of petitioner (the vessel) the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Emphasis added.)

The Court gave no indication of just what conduct on the part of the vessel would be necessary to preclude recovery of indemnity against the stevedore, but indicated clearly that the test of liability in the indemnity action rests on *different* principles than the liability of the vessel to the Plaintiff in the main case. It reiterated in a footnote (2 L. Ed. 2d 282) the admonition of the *Ryan* case that (350 U. S. at 134): "the shipowner's action is not changed from one for a breach of contract to one for tort simply because recovery may turn upon the standard of performance of petitioner's stevedoring service", and stated (355 U. S. 567-568, 2 L. Ed. 2d 494-495, 78 S. Ct. 442, 443):

> "The evidence bearing on these issues (the indemnity issues)—Petitioner's action in making the shelter on its ship available to respondent's employees in Boston, although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—*was for jury consideration under appropriate instructions.* These issues were not encompassed by the instructions in the main case, where the test of Petitioner's liability was based on failure to perform a non-delegable duty to Connolley.

Since the liability of respondent depended on different principles, Crawford v. Pope & Talbot, Inc., (C. A. 3 Pa.) 206 F. 2d 784, 792, all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case." (Emphasis supplied.)

Recognizing that the jury verdict in the main case might have been predicated on one of at least three different grounds the Court concluded that at least one of these reasons, i.e., the failure on the part of the vessel during the five days in Boston to inspect the shelter and to detect and correct the unsafe condition would not preclude a recovery of indemnity by the vessel.

In *Weyerhaeuser* there was a *direct contract.* It did not contain an express indemnity clause but it obligated the stevedore to faithfully *furnish such stevedoring services as may be required,* and to provide *all necessary labor and supervision* for the proper and efficient conduct of the work. This Court held that such language constituted *a contractual undertaking* to perform with reasonable safety and *to discharge foreseeable damages resulting to the shipowner from the contractor's improper performance.* It then held that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo as in *Ryan,* but also to the use of equipment incidental thereto, such as the winch shelter there involved. This Court then said: *"if in that regard respondent rendered a substandard performance which led to foreseeable liability of Petitoner, the latter was entitled to indemnity."* (Emphasis supplied.)

This latter issue the Court said was for jury consideration under appropriate instructions and it found the trial court had erred in directing a verdict instead of submitting the issues involved in the third party case to the jury.

On February 24, 1959, this Court decided *Crumady v. Fisser,* (*supra*). The accident occurred there while cargo was being removed from cargo hatches by means of the

ship's cargo gear. While raising a draft of cargo a topping-lift parted, permitting a cargo boom and its attachments to fall into the hatch, striking and injurying the Plaintiff. The safe working load of the boom and topping-lift at the time of the accident was three tons. A shut-off device on the boom had been set at six tons by employees of the ship before being turned over to the longshoreman. The trial court held the vessel unseaworthy and liable to the injured longshoreman. The trial court found that the stevedores had shifted the boom in an effort to gain more clearance between the cargo and sides of the hatch, creating a load in excess of the safe working load. It held the stevedoring contractor liable for indemnity (142 F. Supp. 389) because it was negligent in bringing into play the unseaworthy condition of the vessel and that such negligence amounting to a failure of the stevedoring contractor to perform the duties necessarily comprehended within the contract was the sole cause of the injury.

The Court of Appeals for the Third Circuit reversed on the basis that the vessel was not unseaworthy and hence did not consider the question of indemnity. This Court reversed the Third Circuit, and held that the shipowner was not relieved of his duty to supply a seaworthy vessel by turning control of the loading or unloading of the ship over to the stevedoring company. The Court based its opinion on the fact that the shut-off-device was adjusted by the ship's crew so as to make it unsafe and dangerous for the work at hand. This Court, however, felt that the shipowner was entitled to indemnity under the principle announced in the *Ryan* and *Weyerhaeuser* cases, because the stevedore had assumed the responsibility by contract for the shipowners' damages resulting from improper performance of the services undertaken amounting to a breach of its contract, notwithstanding that the vessel's owners were not directly parties to the contract but merely beneficiaries of the contract. The Court concluded the District Court's finding that *the negligence of the stevedoring contractor*

brought the unseaworthiness of the vessel into play and amounted to a breach of warranty of workmanlike service, was not clearly erroneous. No such finding of negligence of the stevedore was made by the jury in our case.

The *Crumady* case still did not undertake a definitive statement of the "conduct on the part of the shipowner" which will bar indemnity. It merely indicated that furnishing defective equipment will not necessarily have that effect.

Thus, Courts attempting to apply *Weyerhaeuser* and *Crumady* have real difficulty in determining what conduct of the shipowner will bar indemnity *and are relegated to making comparisons to the actions of the owners in Crumady and Weyerhaeuser resulting in abstract and conjectural conclusions:* See *Calmar Steamship Co. v. Nacirema Operating Co.*, (4th Cir.) (1959), 266 F. 2d 79, 80, 81; *American Export Lines v. Revel*, (4th Cir.) (1959) 266 F. 2d 82.

In the latter case the Court said: "We do not attempt to explore what conduct, in other circumstances, would be 'sufficient to preclude recovery'. We merely hold that under the decisions of the Supreme Court the limits are not transcended here."

What are the limits? What is the conduct which will bar recovery by way of indemnity? Will any conduct of shipowner bar recovery in the case of the existence of a contract of indemnity? These questions remain unanswered by this Court, because their determination are matters of fact in each case, which *Weyerhaeuser* and *Porello* clearly hold should be submitted to a jury, and are not a matter of law as the Court of Appeals erroneously held in the instant case. Of the recent cases perhaps the case of *McNamara v. Weichsel Dampschifffahrts Ag Kiel, German*, decided by the Court of Appeals of the Second Circuit on September 27, 1961, 293 F. 2d 900, best applies the rule of the *Weyerhaeuser* case. In that case the Second Circuit recognized that it was a factual issue as to whether the shipowner was guilty of such conduct that would preclude its recovery for indemnity. The Court said at page 903:

"Pittston, having undertaken the stevedoring, was under a duty to perform it in a workmanlike manner. If it rendered substandard or improper service, Pittston would be under a duty to indemnify Weichsel for any liability imposed upon Wiechsel as a result of such service. This obligation to indemnify may be nullified, however, if Weichsel's conduct was such as to preclude recovery. The difficulty lies in determining what conduct is sufficient to defeat Weichsel's right to indemnity. The fact that the jury found Weichsel to have been negligent in the action between plaintiff and Weichsel is not conclusive of such conduct. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 1958, 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491; Ryan Stevedoring Co. Inc., v. Pan Atlantic Steamship Corp., 1956 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133. . . . However, whether Weichsel has been guilty of such conduct on its part as to foreclose indemnity is essentially a question of fact and should be determined by a jury. In Weyerhaeuser, the Supreme Court said 'all fact issues involved in the third party action should have been submitted to the jury after verdict in the main case. . . .'"

"Here there are at least two important fact questions. Was there substandard performance of its stevedoring contract by Pittston? Was there conduct by Weichsel sufficient to bar recovery? . . ."

In the instant case, since the jury specifically found for petitioner on the first of these two questions it was not necessary for it to consider the second question. But if it be assumed for the purpose of argument, that the Court of Appeals was right in holding that the jury should have found petitioner guilty of negligence, this fact is, as we have shown, not sufficient of itself to saddle liability for indemnity on petitioner. The jury would still be obliged to determine as a factual matter whether conduct of the shipowner

precluded such recovery under the rule of the *Weyerhaeuser* case. The latter fact was determined by the jury in its answer to Interrogatory No. 2 (R. 188a) when it found that the negligence of the respondent was a substantial factor in causing injuries to the plaintiff.

It is only where a jury or the fact finder, finds negligence of the stevedore amounting to a breach of contract and that there is an absence of conduct to preclude recovery of indemnity that an obligation to indemnify may be found.

In *Waterman S. S. Corp. v. Dugan & McNamara*, 5 L. Ed. 2d 169 (1960) the stevedore alleged as an affirmative defense that there had been no direct contractual relationship between it and the petitioner covering the stevedoring services. This Court held that although *Ryan* and *Weyerhaeuser* placed considerable emphasis on the direct contractual relationship between the shipowner and the stevedore, *Crumady* made it clear that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper *performance* of the stevedoring services, was unaffected by the fact that contractual *privity* was lacking, because the Shipowner was regarded as the third party beneficiary of the contract which was involved.

Certiorari was granted in the *Waterman* case "to consider whether in a situation such as this the *absence* of a contractual relationship between the parties is fatal to the indemnity claim" (5 L. Ed. 2d 171).

The rule of law requiring that the obligation to indemnify must arise out of some contract and in this class of cases must be based on the breach of some contractual duty has not been changed or abrogated by any of this Court's recent decisions.

It is thus clear that an action for indemnity *must arise out of a contractual obligation clearly expressed*, even though the parties are not in direct privity, and that an indemnitee has a claim which is independent of and does not derive from the injury to the employee.

It would thus seem that an obligation to indemnify cannot, since the enactment of the Longshoremen's Act, be

predicated on the quasi-contract theory of indemnity. That theory depended on the application of equitable principles, the need for which originated in the desire to escape the hardship of the common law prohibition against contribution, whereas the issue now becomes one of the duty between the putative indemnitor and indemnitee based on the relationship between them other than joint tortfeasor.

This Court, in this case, should consider whether in the *presence* of a written contract between shipowner and stevedore containing limited provisions for indemnity and expressly limiting the performance of the stevedore to fixed written standards and obligations which a jury expressly found were performed, a Court may nevertheless impose the burden of indemnity solely on an implied warranty of workmanlike service referred to in *Ryan, despite a well-founded specific finding of fact that no act of the stevedore was in breach of the written contract between the parties.*

In the presence of a writing defining the obligations of the parties, specific provisions setting forth the limits of the duties assumed by the Petitioner are to be expected. There is no evidence that in the instant case the parties had not chosen the language of the contract with care and premeditation. When it was desired that the shipowner be *indemnified* as to loss of cargo (R. 152a) it was not difficult to impose an obligation to reimburse and set forth the conditions under which the obligation so undertaken should be operative. We should expect no less as to the heavy burden of being responsible for injuries to longshoremen employed by the stevedoring company. Indeed, in view of the language of Section 5, of the Longshoremen's Act,[3] "a consensual obligation" such as found in *Ryan* and other cases to save the shipowner harmless, should be

3. "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury. . . ." 44 Stat. 1426, 33 U. S. C. 905.

very clearly expressed within the requirement of the rules hereinafter discussed, applicable to indemnity agreements generally.

The decision of this Court in this case will have a salutary effect upon future transactions of shipowner and stevedore, if it concentrates the attention of litigants on the hazards of incomplete draftsmanship of contractual provisions defining the duties assumed by the stevedore. Thus for example, if it is intended that the employer shall assume the duty of *making* and keeping the vessel seaworthy, at least with regard to the parts and equipment to be used by his employees, and that this obligation shall extend no less to the appliances furnished by the shipowner than to those brought on board by the employer, *the contract should say so* and if they have not, it should at least be arguable that they intended the contrary by their omission. It is reasonable to require that such contracts be drawn so as to make clear those areas of responsibility which are to be unaffected by the contract relationship, as well as those which are assumed by the employer.[4]

The cases make it clear that if the shipowner has been found responsible to the longshoreman, because of negligence or failure to furnish a safe place to work or for breach of warranty, any claim for indemnity *which is not based on a duty assumed by a contract* between shipowner and employer or a contract of which the shipowner is a Third Party beneficiary (as in *Crumady* and *Waterman* above referred to) must give way before the effect of Section 5 of the Act.

Judge Learned Hand, in his concurring opinion, developed in some detail his views concerning the effect of the Act. Although he agreed that it "need not inevitably" be construed to bar the claim, he thought it should be so interpreted because:

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4. Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. of Pa. Law Review, 321, 346 (1954).

"it has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence. The release should, I submit, have the same scope as the imposed liability, which extends as well to injuries caused by a joint wrong, as to those caused by the wrong of the employer alone". (182 F. 2d 322, 325).

See *Union Stockyards Co. v. Chicago etc. R. Co.*, 196 U. S. 217, 49 L. Ed. 453;
Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U. S. 282;
Pope & Talbot Inc. v. Hawn, 346 U. S. 406.

The concept of "fault" or "negligence" of the stevedoring contractor in this class of case, as to the employee's injury is not now pertinent. As this Court said in *Ryan*, *"The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring owes to its employee."* (Emphasis supplied.) On the other hand, the liability of the shipowner to the employee may be founded on negligence or failure to furnish a safe place to work or without fault for breach of warranty of seaworthiness.[5]

Of all the cases heretofore referred to however only *Weyerhaeuser*, (*supra*) and *American Stevedores v. Porello*, (*supra*) in the Supreme Court dealt with the *manner in which a specific written contract* relating to the indemnity obligation should be considered by the Court. In each of these cases the specific factual issue here involved was not encountered. But it is significant that in each case the

5. Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, (*supra*, 323).

The basis for a claim of indemnity must be founded on a contract in effect between employer and shipowner and the breach of obligations arising thereunder. The jury in the instant case found no such breach.

Court held that the extent of the indemnity obligation assumed by the contract, when raised, and whether it applied to the specific facts leading to injury, when raised, were issues of fact and that all fact issues should have been submitted to the jury (2 L. Ed. 2d 494).

The *Porello* case was more analytical than the *Weyerhaeuser* case. Faced with a specific written contractual provision relating to indemnity, which at first reading appears to be clear, it nevertheless held that the clause was ambiguous and required evidence to be taken as to the intention of the parties so that the issue could be resolved *as a question of fact.*

Contrary to the requirement of these two cases that the terms of the contract be adverted to and the intention ascertained, the Court of Appeals in the instant case wholly disregarded the terms of the contract and the fact that there was a writing in which the parties had solemnly fixed their rights. It relied instead on the implied contract theory of *Ryan, Crumady* and *Waterman* where there were specific factual findings of negligence amounting to a breach of the warranty of workmanlike service. The Court of Appeals in the instant case also relied upon *American President Lines v. Marine Terminal Corp.*, 234 F. 2d 753, but in that case the specific terms of the contract were adverted to and considered and they were found as a fact to have been breached by the jury.

In the *Porello* case this Court held that the interpretation of the indemnity provision [6] of the contract was to be left in the first instance to trier of the facts having the benefit of whatever evidence existed as to the intention of the parties. There being no evidence as to the intention

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6. "The stevedore performing any service under this schedule shall be responsible for any and all damages or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, cars, and car-floats used in connection therewith, through the negligence or fault of the stevedore, his employees and servants."

of the parties in the record, the Court reversed the award of indemnity and remanded the case to the District Court for a determination of the meaning of the contract. This action stressed the care with which the intention of the parties as expressed in their contract must be analyzed. In the *Weyerhaeuser* case, *supra*, the action of the trial Court in *directing* a verdict in favor of the stevedore contractor was held to be improper. The evidence as to whether the stevedore rendered a substandard performance of its contractual obligation was held to be for the jury's consideration under appropriate instructions. Such a procedure was imperative since the exact basis upon which the shipowner's negligence was found by the jury was uncertain. Whether the right to indemnity exists would most naturally be determined by the jury, which, in the first instance knew precisely upon which of several theories the shipowner's liability was grounded. As in *Weyerhaeuser* where at least three possible bases of liability were apparent and one at least would not preclude indemnity, the jury determination would thus decide whether the theory applied by it warranted a finding of a breach of contract and whether indemnity would follow.

The Court of Appeals Reversed the Findings of the Jury and the Judgment Entered Thereon Upon the Erroneous Conclusion That the Trial Judge Failed to Submit to the Jury the Question of Unsafe Place to Work in Determining Whether Petitioner Breached Its Contractual Obligation.

The Court of Appeals in the instant case disregards the mandate of *Porello* and *Weyerhaeuser*. It gives no consideration and makes no reference to the contract between the parties and ignores the fact that the jury's finding specifically exculpated petitioner of any breach of its contractual obligation, or of any negligence in "handling" cargo in an unsafe place after fully considering the con-

tract under a full and appropriate charge of the trial judge (R. 171a, 172a, 173a).'

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7. "I must so instruct you because I have to go to the second cause of action, which is the action by Ellerman Company against Atlantic & Gulf Stevedores. This action arises out of contract. Ellerman Lines *had a contract with the Atlantic & Gulf Stevedores, and that contract is before you, and you will read it and see just what the Atlantic & Gulf Stevedores contracted to do.*

Under one portion of that contract they were supposed to unload and discharge this cargo of burlap with the utmost care. *There are other portions of the contract that you may advert to; the whole contract is in evidence.* In this action by Ellerman Lines and The City Line against Atlantic & Gulf Stevedores whom the defendants brought in, the focal point of your inquiry is *whether there was any breach of that contract,* whether there was a substandard performance in which there was foreseeability that injury might occur to someone in the breach of that contract, and while there is a tort measurement of that standard it nevertheless is still a contract action, and the third-party defendant, Atlantic & Gulf Stevedores, are only responsible for the breach of that contract.

Ellerman Steamship Company says to you that if there is any liability which we owe to Mr. Beard that condition was created by Atlantic & Gulf Stevedores. That is your criterion: *Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and The City Lines responsible to the Plaintiff? There again you have to run the whole gamut of facts in the case.* You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. *Did they breach that contract to do it in a workmanlike manner with the utmost care?* The steamship company says, "Yes, they did. They breached *that contract.* They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants."

In other words, did the liability of the Ellerman Lines, Limited, and *The City Line, Limited, arise out of any failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?* If you answer that yes, then your next inquiry is: Was the breach of this contract by Atlantic & Gulf Stevedores a substantial factor in bringing about the injuries to the plaintiff?

. . . If you find that Atlantic & Gulf Stevedores did breach *their contract* with the defendant, and that they were the contributing cause of the liability which they incurred to the plaintiff then you should render a verdict in the amount, same amount, which you rendered against the defendant, and you should render that against the third-party defendant, Atlantic & Gulf Stevedores." (Emphasis added.)

It is evident from the quotation of the charge on this point, that although the shipowner had presented no evidence on any other point except the use of the bale hooks, the District Court told the jury that the *whole* contract should be adverted to, and left to them whether there was *ANY* breach of that contract. He left to them whether there was a substandard performance of *any part of the contract* and whether the liability of the shipowner arose "out of *ANY* failure on the part of" Petitioner.

Reference to the charge to the jury also reveals that the Court of Appeals erred in concluding that the "sole criterion" prescribed by the District Court was whether an unsafe method was used in the discharge of the cargo by the bale-hook method (R. 229). On the contrary, the "criterion" submitted by the District Court was whether the shipowner's liability "was created by Atlantic & Gulf Stevedores", and whether Atlantic & Gulf Stevedores created "the condition which made Ellerman Lines and the City Line responsible to the plaintiff" (R. 172a). In determining these issues the jury was instructed that "there again, you have to run the whole gamut of the facts in the case" (R. 172a).

Thus it is evident that the Trial Judge specifically followed the mandate of this Court in the *Porello* and *Weyerhaeuser* cases whereas the action of the Court of Appeals was in direct conflict with the rules of law enunciated in these cases.

Relating the special verdict of the jury to the contract here involved, it is obvious that the injuries were not caused by any failure or negligence of the Petitioner or any act constituting a breach of contract.

The Court of Appeals Erroneously Reversed the Findings of the Jury and the Judgment Entered Thereon in Total Disregard of the Evidence in Support of the Verdict Without Reference to the Terms of the Express Written Contract Between the Parties and Seizing Upon a Suggestion by Counsel for Petitioner, That the Jury Could Have Found Negligence of the Shipowner on the Basis of Improper Stowage and Assumed That the Jury in Fact So Found, Totally Disregarding That Other Independent Grounds of Negligence of Shipowner of Which the Jury Acquitted Petitioner, Were Equally Supported by the Evidence.

The ship's failure to examine the bands of the bales at the time of stowage in India; the improper stowage of the two consignments; the failure to discharge the New York consignment before the arrival of the vessel in Philadelphia and the "unseaworthiness of the vessel", created by these failures and conditions, were all facts and conditions in existence before the initial application of the contract to the particular job here involved. The jury's special verdict holding the shipowner negligent could, as in *Weyerhaeuser*, have been predicated as to negligence on any one of these factual grounds, all existing prior to and in the absence of any act or conduct of the Petitioner, and which would "prevent recovery" of indemnity in the third-party action. (*Weyerhaeuser*, 355 U. S. p. 568.) [8]

8. The Circuit Court seized upon a suggestion, of counsel for petitioner, in its brief, that the jury *could* have found negligence of the shipowner on the basis of improper stowage of the New York cargo and assumed that the jury had in fact so found, totally disregarding that its finding (Interrogatory 2) that shipowner was negligent could have been made upon other independent grounds of negligence equally well supported by the evidence. On this *speculative* suggestion, made only as part of the argument, as being within the realm of possibility, the Court below predicates its holding, treating it as an established fact. Forced to recognize that it was only *speculation* however the Court below evidences the utter weakness of the assumption when it says (289 F. 2d 201, 207): ". . . and

To hold that a stevedore may be liable as an indemnitor for the liability of a shipowner caused by the shipowner's negligence and conditions committed and existing at the time of the application of the contract and merely for working under such conditions or for the interaction of such conditions, equipment or stowage which the Petitioner did not control and had no contractual duty to supply, repair, correct or control, is to make of the stevedore an absolute guarantor and to create a contractual indemnity far beyond the compass of the agreement actually made and here involved: *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957) aff'd per curiam, 254 F. 2d 600 (3rd Cir. 1958), which held that under such circumstances the stevedore was performing, not breaching, the contract.

Under the facts presented by the evidence, nothing short of a contract agreeing to hold the shipowner harmless or indemnifying the shipowner against its own independent negligence and expressly accepting liability to Petitioner's employees caused by the shipowner's acts in creating or causing an unseaworthy condition, in whole or in part, could be held to impose such absolute liability on the stevedore—No Such Contract Existed.

The effect of the decision of the Court of Appeals is to create such absolute liability on the part of the stevedore who enters into *any* indemnity agreement no matter how carefully the language of the agreement is written to limit such indemnity. Since a stevedore is generally deemed to be an "expert" the conclusions reached by the Court of Appeals in this case, if allowed to prevail as the applicable law, would require every Court to hold that the "expertise" of

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thus *if* it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic, to "handle" the cargo in the unsafe place to work." (Emphasis supplied.)

The fact is that the answer to Interrogatory No. 2 was justified for any one of several reasons supported by the evidence other than the one "suggested" by the Petitioner's counsel and such other grounds did not involve the Petitioner at all.

the stevedore is in itself a sufficient substitute for a specific and clear agreement to be liable as an indemnitor. This is directly contrary to the holding of *Porello* and *Weyerhaeuser*.

A contract for indemnity against the consequences of one's own negligence must be clear and definite in its provisions: *Chicago R. I. & P. R. Co. v. Williams*, 245 F. 2d 397. The language employed must clearly and definitely show an intention to indemnify against a certain loss or liability; otherwise it is not a contract of indemnity: 42 C. J. S. Indemnity Section 5; *Frankel v. Johns Manville Corp.*, 257 F. 2d 508; *Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 35, 36. In the latter two cases the indemnitees were found to be negligent, while the indemnitor, as in our case, was found not to be negligent. The Court, in each case, pointed out the necessity for unequivocal language, if one is to be indemnified against his own negligence and denied recovery to the indemnitee: Cf. *Salamy v. New York Central System*, 146 N. Y. S. 2d 814.

An agreement by a stevedore to indemnify a party for liability for personal injuries must express an intention to throw loss upon the indemnitor beyond peradventure of a doubt: *Pierce v. Erie R. Co.*, 165 F. Supp. 216, aff'd 264 F. 2d 136.

Where an express contract exists, the law will not imply a different agreement: *Martin v. City of Port Huron*, 111 F. 2d 759 (C. C. A. 6th 1940); *Haver v. Bond Stores*, 178 F. 2d 836 (C. C. A. 6th 1950); *Ferroline Corp. v. General Analine & Film Corp.*, 107 F. Supp. 326, affirmed 207 F. 2d 912, cert. denied 74 S. Ct. 678, 347 U. S. 953, rehearing denied 74 S. Ct. 748, 347 U. S. 979.

It is not believed that this Court intended in the *Ryan* case, or any case involving similar issues since that time, to undermine the Longshoremen's Act or to announce as an absolute principle of law that, without regard to whether a stevedoring company intends to agree to indemnify or

agrees to indemnity only in the event of certain contingencies involving its own negligence, it has nevertheless agreed to absolute liability for such indemnity merely because it agrees to do a job. We submit *Weyerhaeuser* makes it clear that this was not this Court's intention in *Ryan*. On the contrary *Weyerhaeuser* makes it clear that in the *presence* of a written contract, the terms of the writing must be considered and will control.

The Court of Appeals in the instant case held instead that the contractual obligation of the stevedore was to be equated with the duty of the shipowner to the Plaintiff. Hence, solely on the fact that the shipowner was found to be negligent it concluded that the stevedore had to be negligent, despite the jury's special verdict to the contrary.

The effect of the holding of the Court of Appeals is to thwart entirely the import of the limited liability of a stevedore which the Longshoremen's Act was deliberately designed to afford except where the stevedore specifically and voluntarily assumes burdens beyond the Act by contract. There is no evidence in this case to support the conclusion of the Court below that the petitioner voluntarily agreed to give up the limited liability which the Longshoremen's Act afforded. It agreed contractually and in writing merely to do its work "with every care and due dispatch to the satisfaction of" the shipowner (R. 148a) (Appellant's Appendix). (Since there was no damage to cargo the agreement to pay for damage to cargo if "caused through rough handling and/or theft or pilferage by the stevedore's men during the time of stevedoring operations" is not applicable here (R. 152a). *There are no other words or language* in the agreement relating to indemnity. The absence of such words in the presence of a written contract setting forth in detail the rights, duties, and obligations of the parties must be held to mean that no voluntary burden of indemnity was assumed or accepted. Since the shipowner wrote the contract and found no difficulties in clearly imposing an obligation of indemnity in the case of damage to cargo it must be

assumed that if he had wanted indemnity as to other losses or injuries he could have so stated in clear, unambiguous and unmistakable terms.

The decision of the Court of Appeals is contrary to law generally and in direct conflict with *Porello* and *Weyerhaeuser*.

III.

A Consideration of Cases Involving the Liability of a Putative Indemnitor Since the Enactment of the Longshoremen's Act.

Whereas in the instant case, the putative indemnitor's liability to the injured party is abolished by statute, the situation no longer calls for the application of the doctrine of indemnity on the same principles which govern the ordinary case of tortfeasors; that a difference in the nature of degree of fault as between them may entitle one to shift the entire burden of loss to the other as in *Standard Oil Co. v. Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (2nd Cir., 1929). Cases like the *Robins* case (*supra*) involved situations where both indemnitor and indemnitee are liable to the injured party.

When the putative indemnitor's liability to the injured party is abolished, as it was by the Longshoremen's Act, the case takes on a different aspect. If the Longshoremen's Act is held to constitute a bar to contribution claims (*Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282) then indemnity in this sense must be in the same category, since it is, after all, for this purpose merely an "extreme form of contribution". (*Slattery v. Marra Bros., Inc.*, 186 F. 2d 134, 138). On the other hand, if the stevedore has breached an independent duty owed to the shipowner, as for example *a contractual duty* the case may be viewed on a different footing. Inasmuch as the employer no longer owes any enforceable duty of due care to the employee, any discussion of "fault" or "negligence"

of the employer can be relevant only to the extent it bears upon the *proper construction of his independent duty to the shipowner* which in this class of cases derives from the contractual relationship. In the courts which have considered this question, this approach has won acceptance in the best considered cases.

Thus, in *United States v. Harrison*, 245 F. 2d 911 (9th Cir. 1957) the Court held that even where an express indemnification contract exists, recovery over against the stevedore may be denied where it was expressly found that the stevedoring company was not at fault or negligent in any manner and that the injuries sustained by the longshoreman while unloading cargo from an oily deck of a government vessel was the sole fault of government agents. It was held, relying on *Sieracki* (328 U. S. 85, 100), that the contract of indemnity did not shift to the stevedore the burden of keeping the vessel seaworthy at all times and that the stevedore was not bound by the contract not to unload the vessel until the slippery deck had been remedied by the stevedore himself.

In the case now before this Court, as in *Harrison*, the jury expressly found that Petitioner was not at fault and that the shipowners' fault did not arise out of any breach of contract by stevedore. Neither *Harrison* nor the instant case involves facts where the unseaworthiness was caused by the stevedore himself and the ship is held to absolute liability as a result (Cf. *Ryan*, 350 U. S. 124).

In *American Steamship v. Copp*, 245 F. 2d 291 (9th Cir. 1957) the Court denied indemnity on the basis that both the vessel and the stevedore were joint tort feasors, concurrently, continuously and actively negligent, and that such negligence on the part of both was the proximate cause of the Plaintiff's injury. The Court recognising that this Court had treated of the subject said:

> "With such a fact situation, therefore, this case is governed by the decisions of the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting*

Corp. . . . That opinion may weaken to some extent the authority of the decisions of the appellate courts of the federal system relating to indemnification of the ship by the stevedore. But no opinion need be expressed as to that point here."

Thus, even if in the instant case the jury had found the stevedore guilty of negligence no right to indemnity would follow in view of the finding that the negligence of the shipowner was the substantial factor in causing Plaintiff's injuries.

In *Reddick v. McAllister Lines Ltd.*, 258 F. 2d (2nd Cir. 1958, certiorari denied 358 U. S. 908) a longshoreman was injured when he fell from a defective wooden crate on a ship during unloading operations. The trial court held the ship unseaworthy, found the longshoreman had not been furnished with a safe place to work because of the defective crate, but allowed indemnity on the basis that the stevedore was negligent in stowing the crates too closely. The Court of Appeals reversed and denied indemnity on the theory that the injury was caused by the defective crate and that the stevedoring company's breach of warranty in loading the cargo improperly, was not a cause of the injury. Although considering the cases of *Ryan* and *Weyerhaeuser* the Appellate Court held that under the general test of foreseeability applied to contractual liability the breach must be the cause of the injury, to impose liability.

In the *Hagens* case (*supra*) the Third Circuit Court, referring to *Weyerhaeuser*, held the shipowner was not entitled to indemnity from the stevedore where the injury to the longshoreman resulted from a defective and unseaworthy winch which contractually was to be furnished by the shipowner and where the stevedore's negligence consisted only of failing to discover and correct the shipowner's breach. By analogy to the *Ryan* case, the Court declared that "the promisor cannot use the promisee's failure to discover and correct the provisor's own breach as a defense."

The *Hagans* decision was followed in *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957), affirmed per curiam (254 F. 2d 600) several months after the decision in *Weyerhaeuser*, and also in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional* (*supra*). In the *Smith* case, Judge Kirkpatrick granted judgment n.ov. in favor of the stevedore on the authority of *Hagans*, reasoning that the stevedore's negligence did not supersede the ship's violation of its duty to furnish seaworthy equipment. In the course of his opinion Judge Kirkpatrick made these vital observations (161 F. Supp. 422, 423):

> "In the present case, the alleged default of the stevedore was not in breaching its contract but in carrying it out under conditions created by the shipowner. In substance, the shipowner argues that the stevedore should have stopped the work until the winch was fixed but, *bearing in mind that the basis of indemnity is contractual*, how can it be argued that the stevedore breached its contract with the ship by not refusing to go on with the equipment furnished by the ship? *Is it part of a stevedoring contract that the stevedore will walk off the job if he finds the ship's equipment unsuitable? It may be negligent for him not to do so but it is in furtherance of his contract rather than a breach of it, and the shipowner could hardly hold him liable for trying to complete the work.*" (Emphasis supplied.)

So, in *Hodgson* (*supra*), where the stevedore was actually required to "provide all necessary stevedoring labor, including winchmen . . . and such other stevedore-supervision as are needed for the proper and efficient conduct of the work" the Court held (294 F. 2d 32, 24) that under their agreement the stevedoring company was not required to act as an insurer against any loss the shipowner might suffer, or to maintain the winches. Referring to the cases of *Ryan and Weyerhaeuser* and the obligation of the stevedore to perform its services in a workmanlike manner, the

Court held that whether the stevedore's conduct constituted a breach of the contractual provision was, of course, a question of fact for the jury.

The cases decided by this Court have made it clear that the liability arising from a shipowner's duty to provide a seaworthy vessel is absolute (*Seas Shipping Co. v. Sieracki*, 328 U. S. 85) and is essentially a species of liability without fault and that the liability is neither limited by conceptions of negligence nor contractual in character (*Mitchell v. Trawler Racer*, 362 U. S. 539). The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability (*Alaska S. S. Co. v. Petterson*, 347 U. S. 396).

On the other hand, it is equally clear from the decisions of this Court and other Courts heretofore analyzed in this Brief that the liability of a stevedore for indemnity since the enactment of the Longshoremen's Act is contractual in character (*Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.* (*supra*)). The critical questions in actions for indemnity therefore are (a) whether a contractual obligation exists, (b) whether there has been a breach of such contractual obligation, that is, whether the stevedore rendered a substandard performance which led to foreseeable liability of the shipowner (*Weyerhaeuser, supra*) and finally, (c) whether there is conduct on the part of the shipowner sufficient to preclude recovery. Each of these questions require resolution of facts, which a jury is not only most competent to do, but is indeed alone justified, under our law, to do.

No fixed pattern can be set as to what conduct on the part of a shipowner will be sufficient to preclude recovery. The cases discussed in this subdivision however represent decisions which involve facts most frequently found. Their holdings may be summarized, as general rules, by no means exclusive, applicable to such situations as follows:

Where it is expressly found that the stevedore was not at fault, and that shipowner was alone responsible for

unseaworthiness and negligence, no indemnity can be recovered.

Where both parties are equally guilty of wrongful conduct one of such guilty parties has no right of indemnity or contribution from the other, if he has been held responsible in damages to the injured party.

Where the shipowner is found guilty of negligence which is the cause of the injury and stevedore's breach *is not* the cause of the injury under the general test of foreseeability applied to contractual liability, there is no right to indemnity.

Where it is found the shipowner provided defective equipment, failure of the stevedore to discover the defect, or continuing to work in the presence of the defective equipment will not subject stevedore to an obligation to indemnify.

In the absence of a contractual obligation to inspect or maintain equipment supplied by, or to correct conditions created by the shipowner, a stevedore is not an insurer against any loss that the shipowner might suffer and is not liable as an indemnitor, unless he expressly assumes the obligation of an insurer.

Conclusion.

The questions here presented are of paramount importance in the decision of longshoreman cases brought against shipowners and involving third-party actions for indemnity against stevedores, particularly when the contract between stevedores and shipowners is in writing. Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in almost every such case hereafter brought, including many cases now pending.

This decision places in grave doubt whether the express written undertakings and limitation of responsibilities be-

tween shipowner and stevedore have any meaning. It is of industry-wide concern that such a written contract can be nullified by imposing the duty on a stevedore to indemnify a shipowner for the breach of an implied warranty, by striking down a jury finding that the express provisions of a contract were not breached.

Congress passed the Longshoremen's and Harborworkers' Act to establish liability without fault, albeit in a lesser sum. It thereby relieved employers of large tort verdicts. In so doing, absolute liability was imposed upon the employer to provide a fair measure of compensation to its injured employee. After the Longshoremen's Act the claim by a shipowner for "contribution" was denied *where joint negligence existed. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952).

Since the passage of the Act, shipowners have sought to have stevedores agree by contract to accept a consensual obligation to indemnify shipowners for liability shipowners may have to longshoremen. Such contracts are valid despite the Longshoremen's Act and are enforceable. On the other hand, they should not be construed to enlarge the liability of a stevedore beyond the obligations which he does in fact consensually undertake. They should be construed cautiously and indemnity allowed only when it is expressly and clearly assumed. The case before this Court holds the Petitioner liable for indemnity without limitation and without reference to the terms of the written contract. If the decision of the Court of Appeals is permitted to stand the stevedore is deprived of the protection intended by the Act.

The result is to make a stevedore wholly liable for all injuries to its own employees in the absence of any showing that its work could have been performed more safely. Thus the financial burden intended to be removed from the shoulders of the stevedore by the Longshoremen's Act has been replaced, although not voluntarily assumed or clearly justified by law or contract. Such harsh consequences can lead to the survival of but a few of the stevedoring firms who

possess an infallible degree of "expertise" or a willingness, backed by sufficient wealth, to become an insurer. The end result must adversely affect the entire shipping industry.

This decision is a sharp erosion of the Constitutional mandate that "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." Unless this decision is reversed further erosion of the mandate will surely follow.

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed and the judgment of the District Court be reinstated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961

No. 282

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner.

v.

ELLERMAN LINES, LTD.

and

THE CITY LINE, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION AND BRIEF OF *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

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IN THE

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ATLANTIC AND GULF STEVEDORES, INC.,
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ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICES OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The National Association of Stevedores respectfully moves this Court, pursuant to Rule 42(3) of the Revised Rules (1954) for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioner has been obtained. The consent of the respondent was requested but refused.

The interests of the movant in this case and its reasons for requesting leave to file the accompanying brief *amicus curiae* appear below.

Movant is a non-profit trade association composed of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 longshoremen are employed by the Association's members. These members handle about 70% of all of the cargo lifted in this country.

It is obvious that the interests of the Association as a group and of each of its members as individual stevedoring concerns are affected by the decision below, in that a right to trial by jury has been denied in indemnity litigation with which each of the Association's members is frequently involved.

Aside from the right to a trial by jury, which undoubtedly the petitioner will adequately present to the Court, the decision below has raised an issue which, to the movant and to the entire shipping industry, is of major significance. The Court of Appeals has by its decision created a rule which would grant indemnity to shipowners in circumstances where the shipowners own conduct should, in justice, have barred it and, at the same time, has thereby absolved the shipowner of any responsibility for safety with respect to the vessel, its appurtenances and its cargo.

Put another way, the decision below constitutes an open invitation to shipowners for the continued tendering of dangerous ships, ships for which the shipowner has no responsibility for safety, to stevedores for loading and discharge. It is this safety issue which bears directly on the high incidence of what should be preventable shipboard accidents. Movant believes that the relationship between the law of indemnity and the responsibility for effective implementa-

tion of safety standards in shipboard stevedoring operations requires the attention of this Court. Movant submits that the legal principles which have the effect of deterring accidents are just as substantial a consideration for this Court as the redress of a wrong.

We urge, therefore, the clarification and restatement of the principles of indemnity announced by this Court's recent decisions on the subject, so that the areas of responsibility for safety in shipboard stevedoring operations can be clearly understood by all.

Movant, accordingly, requests leave to file the accompanying brief so that this issue, which is of great importance to the stevedoring and shipping industries alike, can be presented to the Court.

Respectfully submitted,

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December 6, 1961

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE*

Facts Pertinent To This Brief

The basic facts have been set forth in the brief filed on behalf of Atlantic & Gulf Stevedores, Inc., the petitioner. It is not necessary to repeat them here. There are other pertinent facts, however, which The National Association of Stevedores feels should be presented to the Court.

The Interest of The National Association of Stevedores *Amicus Curiae*.

The National Association of Stevedores is a non-profit trade organization of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 longshoremen are employed by the Association's members. These members handle about 70% of all of the cargo lifted in this country.

The interest of the Association in this case is two-fold:

1. The individual and direct concern of the members of the Association with the preservation of the right to trial by jury in indemnity actions.

2. The moral and economic concern that the decision below, if allowed to stand, will induce rather than deter what should be preventable shipboard accidents.

ARGUMENT

I.

All essential facts having been submitted to the jury, the Court below was not free to make new findings of fact which conflicted with those found by the jury.

Among plaintiff's claims of negligence against the vessel were:

1. The failure of the ship or its representatives to inspect the bands around the bales when the cargo was being loaded in India (R 7a*, R 65a, R 66).

2. The failure of the vessel to discharge the New York cargo at its proper destination (R 6a).

3. The failure of the ship to direct a cessation of work with knowledge that it had created an irremedial condition of peril by the manner of the stow (R 6a, R 177a).

The special interrogatories addressed to the jury did not, nor did they seek to, disclose the specific ground upon which the jury might posit negligence upon the vessel. The jury's answers to the Court's interrogatories simply found the vessel unseaworthy and its representatives guilty of negligence.

The opinion of the Court of Appeals held that the jury's finding that the stevedore had performed its duties in full accord with the terms of its contractual relations with Ellerman Lines and consonant with good stevedoring practice was erroneous as a matter of law. The Court of Appeals said (369 F 2d 201, 207):

> "Application of the principles stated to the indemnity action compels the determination, under the

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* Citations preceded by R are to pages in the Appellants Appendix in the Court of Appeals.

> particular facts here and the jury's finding with respect to Ellerman's negligence, that Ellerman is entitled to indemnity from Atlantic as a matter of law."

The "particular facts" to which the Court of Appeals adverted were found, not upon the basis of any determination by the jury, but upon the arbitrary holding that there was "ample basis for a jury fact-finding" that would support the imposition of liability for indemnity upon Atlantic & Gulf Stevedores, Inc. The Court continued (289 F 2d 201, 207):

> "As already pointed out, the record affords ample basis for a jury fact-finding that (1) use of the bale hook method in the discharge of the burlap bales constituted negligence, and (2) that the injured longshoreman was not afforded a safe place to work."

Nowhere in the Court of Appeals opinion is there considered the possibility that the jury might have found Ellerman Lines, Ltd. guilty of negligence in its failure to inspect the bands on the bales prior to the loading of the vessel in India. Surely, it is not the function of an Appellate Court to arbitrarily pick and choose among possible grounds of ship liability, to search out one which will sustain a finding of indemnity as against a stevedore to the exclusion of equally plausible ground which would preclude indemnity.

By ignoring the possibility that the jury found that Ellerman was negligent in its failure to inspect the bands prior to loading, the Court of Appeals rejected a conclusion consistent with the jury's answers to the special interrogatories and adopted, as a matter of law, the only interpretation which rendered the jury's determination inconsistent. This, for the reasons argued by Petitioner, clearly violates the 7th Amendment of the Constitution. *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, 3 L ed 2d 935, 79 S Ct 921.

II.

The decision of the Court of Appeals is in contravention of the oft-expressed policy of this Court that the furtherance of shipboard safety is of major importance in the molding of maritime law.

The problem presented by the decision below concerns itself with shipboard accidents or, in a broader sense, accidents with which a vessel on navigable waters is connected and as such fall within the jurisdiction of the admiralty law.[1]

The molding of admiralty law is peculiarly the concern of this Court because it is, to a major extent, judge-made. In *The* Tungus v. *Skovgaard*, 358 US 588, 611 3 L ed 2d 524, 539, 79 S Ct 503, 1959 AMC 813, Mr. Justice Brennan, concurring in part and dissenting in part, said:

> "Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. . . . This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational. Admiralty law is an area where flexibility and creativity have been demonstrating this."

Mr. Justice Frankfurter made a similar comment in his dissenting opinion in *Mitchell* v. *Trawler* Racer, 362 US 539, 550, 4 L ed 2d 941, 949, 80 S Ct 926, 1960 AMC 1503:

> "No area of federal law is judge-made at its source to such an extent as is the law of admiralty."

The fostering of safety is of major importance in the molding of maritime law insofar as it bears upon that class of workers and those types of accidents with which the decision below is concerned. From a legal viewpoint injuries

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[1] *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 87 L ed 596, 63 S Ct 488; Act for the Extension of Admiralty Jurisdiction 46 U. S. C. § 740.

to shore-based maritime workers can be divided into two categories: (1) those injuries solely caused by negligence of the stevedore, and (2) those injuries where the vessel's unseaworthiness or the vessel owner's negligence plays a role. With regard to the first classification the entire field of recompense for injury has been preempted by the terms of the *Longshoremen & Harbor Workers' Compensation Act* (33 USC § 901, et seq.). With regard to the second classification—those injuries to shore-based maritime workers, e.g. longshoremen, ship repairers, etc., in which the vessel's unseaworthiness or the shipowner's negligence is a factor, it is manifest that this Court is as much concerned with the prevention of such accidents as it is with recompensing the wrong.

Recent admiralty decisions of this Court reflects a keen concern for the preservation of the life and safety of the maritime worker.

In 1946 when the warranty of seaworthiness was extended to the very type of worker with which we are concerned here, the longshoreman, this Court said (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94-95, 90 L ed 1099, 1106, 66 S Ct 872, 1946 AMC 698.)

> "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S. S. Co., 321 US 96, 88 L ed 561, 64 S Ct 455, supra; Atlantic Transport Co. v. Imbrovek, 234 US 52, 58 L ed 1208, 34 S Ct 733, 51 LRA (NS) 1157; Carlisle Packing Co. v. Sandanger, 259 US 255, 66 L ed 927, 42 S Ct 475, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

In 1960 the Court again had before it a case involving the warranty of seaworthiness owing to a seaman, *Mitchell* v. *Trawler* Racer, 362 US 539, 563, 4 L ed 2d 941, 956, 80 S Ct 926, 1960 AMC 1503. In that case Mr. Justice Frankfurter, in the course of his dissenting opinion, noted that in declaring the owner's duty to a seaman to provide a seaworthy vessel:

> " . . . the Court gave expression to a policy, long discernible in American admiralty decisions of implying the warranty not merely because of customary expectations of the parties to an agreement—The English Court's basis for rejection of the warranty in Couch *v.* Steele (Eng.) supra—but as well in order to increase protection to life and property against the hazards of the sea."

The members of the majority of the Court in the *Mitchell* case had no disagreement with the above quoted principle.

A parallel can be seen in the concern which Congress has had for the safety of railroad workers.[2] This was discussed in a very recent decision of this Court involving an injury to a seaman. *Kernan* v. *American Dredging Co.*, 355 US 426, 2 L ed 2d 382, 78 S Ct 394, 1959 AMC 597. Mr. Justice Harlan, in writing for the dissenting members of the Court (on a point with which the majority did not disagree) said (355 US 426, 446):

> "In the cases involving the Safety Appliance and the Boiler Inspection Acts, the Court has repeatedly emphasized that the manifest purpose of Congress was to foster through these particular Acts the safety of employees and to make employees secure in their jobs, a purpose partially evidenced by statements prefacing each of these Acts as they were originally enacted: 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to . . .' follow the rules of each Act. 27 Stat 531; 36 Stat 913;

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[2] Safety Appliance Act, 45 USC § 1-6; Boiler Inspection Act, 45 USC § 22-34.

Illinois Cent. R. Co. *v.* Williams, 242 US 462, 466, 467, 61 L ed 437, 440, 441, 37 S Ct 128; Urie *v.* Thompson, supra (337 US at 190, 191). In keeping with this statement of purpose, two sections of the Safety Appliance Act expressly refer to the civil liability of employers to injured employees by abrogating the common-law defense of assumption of risk and by preserving such civil liability over a particular exception to the general liability for fines payable to the United States which is imposed on carriers for violation of the provisions of the Act. 27 Stat 532, 45 USC § 7, 36 Stat 299, 45 USC § 13."

The necessity to place responsibility for safety on those most logically capable of preventing accidents was recognized by this Court as recently as 1958 in its decision in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 2 L ed 2d 491, 78 S Ct 438, 1958 AMC 501 wherein the Court noted that a shipowner was entitled to indemnity except where the shipowner was guilty of conduct which would preclude it. This was nothing short of a mandate to shipowners that they, as well as the stevedore, were to be held accountable for conduct which failed to measure up to recognized standards of safety. What those standards may be, and therefore, what conduct will actually preclude a recovery of indemnity is, or should be in each case, a question of fact for the jury upon the consideration of the pertinent evidence. *McNamara* v. *Weichsel Dampschifffahrts Ag Kiel, Germany*, 2 Cir. 1961, 293 F. 2d 900.

Some courts unmindful of the significance of the caveat "absent conduct on its part sufficient to preclude a recovery," have reserved to themselves the determination of what conduct would bar recovery of indemnity. *Calmar S/S Co.* v. *Nacirema Operating Co.*, 4 Cir. 1959, 266 F. 2d 79; *American Export Lines* v. *Revel*, 4 Cir. 1959, 266 F. 2d 82. This perhaps explains the error of the Court below in electing to treat the question of indemnification as a matter of law rather than as a matter for the determination of a jury.

A ship is a uniquely perilous instrumentality. *The State of Maryland*, 4 Cir. 1936, 85 F. 2d 944, 945. Its booms, hatches, cargo hooks, winches, steel runners, ladders and the special construction of the vessel itself present almost unparalleled hazards. Concerning this, it is not surprising that the stevedoring industry is characterized as a hazardous one by a high accident rate.[3]

The inroads which have been made in recent years upon a mounting accident rate have been brought about by conscientiously applied and faithfully administered safety programs.[4] To the exent which the stevedoring industry is capable of exercising control and dominion of the sources of peril to its workers, it has succeeded in reducing injury.

The fact remains that stevedoring operations are performed in and about a situs—the ship—which is not the stevedore's, but which is owned, operated, managed, controlled and maintained by strangers to the stevedore. The stevedore's connection with the vessel is transitory at best, while the employees of the vessel owner have a permanent and long standing association with the vessel. They are, therefore, familiar with its peculiarities and are, or should be, alive to the peculiar conditions of peril of their own ship.

Certainly stevedores are "experts" in the technique of stevedoring and certainly the stevedore should bend its

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[3] "Longshoring frequency (injury) rates are extremely high in comparison with those in general industry * * *". First Annual Report (1960) Public Law 85-742, Safety & Health Administration, Bureau of Labor Standards, U. S. Department of Labor (p. 9). "Longshoring is basically a materials handling process and as such is hazardous work * * *". "It should be noted, however, that the stevedore industry has a number of unique factors which intensify the hazardous and tend to make safety work unusually difficult". Longshore Safety Survey (1956), National Academy of Sciences—National Research Council, Publication No. 459.

[4] First Annual Report, (1960) Public Law 85-742, Safety & Health Administration, Bureau of Labor Standards, U. S. Department of Labor (p. i).

special knowledge and skills to the preservation of safety in a loading or discharging operation requiring specialized knowledge applied with skillful prudence.

But of equal certitude is the proposition that the vessel's officers and crew are "experts" also—experts in the unique dangers and peculiar perils presented by their vessel. A mate's ill-conceived stowage plan, a weakened guard rail, a creaking snatch block, a frayed and ancient length of line, a defective winch drum, a cracked hatch cover, cargo that is ostensibly safe but actually flawed and dangerous—all these are conditions which should be observed and corrected by *someone*.

By whom? By the stevedore, whose opportunity to discover and correct dangerous conditions is severely limited not only by the pressing schedule on which he operates, but also by his unfamiliarity with the vessel and its dangers?

Or, is it not more reasonable that the ultimate responsibility for an effective enforcement of adequate safety procedures should rest with those whose familiarity with the ship and its equipment is most extensive, with those whose opportunity to discover and correct defects, dangers or malfunctions is the greatest? It blinks reality to ignore the substantial contribution to longshore safety which could, should and must be made by the shipping industry.

The way to compel the enforcement of safety is the imposition of liability where an industry's standards have been lax or where the measure of reasonable care has been ignored. This can be a prompt, efficient and effective means of promoting safety.

The unthinking facility with which some courts have seized upon the "warranty of workmanlike service" language of this court has done the cause of shipboard safety grave harm. To render indemnification to the shipowner by the stevedore almost an automatic proposition of law (which

is the exact approach taken by the court below in this case) is to absolve the shipowner, and his employees from any real concern about the tendering of a reasonably safe vessel for loading or unloading.[5]

An affirmance of the decision below would regrettably sanction the formulation of a theory of liability which admits of little or no responsibility upon the vessel and its crew for longshore safety. A rule of law which allows a shipowner to turn a callous and uncaring eye upon the safety of longshoremen is a rule of law that is founded not upon reason.

The number of accidents wherein the failure of ship's equipment or a perilous shipboard condition is the substantial cause of an injury has been analyzed. Annexed to this brief is an appendix which illustrates the degree to which these defaults by shipowners have produced injuries and which, we submit, suggests the urgent need for shipowners participation in safety implementation.

Stevedore participation in safety implementation has been assured by Congress in its recent amendment to Sec-

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[5] "The most effective incentive to promoting safety, however, is the promise of a judgment based on fault and adequacy where safety standards are lax and proximately related to the injuries." Robert Klonsky "New Longshoreman—His Status in Jeopardy." 10th Annual Proceedings National Association of Claimants Compensation Attorneys. Similar recognition has been given by others to the rule which legal liability plays in the inhibition of accidents:

"Tort law also serves a proper prophylactic purpose by bringing about a prevention of accidents. Where a habitual defendant causes serious and permanent harm, imposing liability with an adequate award will tend to make employers more careful as to those they employ and in taking safety measures, e.g., in plant and manufacturing and inspection processes, so as to reduce the likelihood of disabling accidents. This is the preventive function of tort law, subsidiary to its fundamental function of compensating for harm." 19 NACCA Law Journal 29

tion 41 of the *Longshoremen & Harbor Workers' Compensation Act*. 33 USC § 941.[6]

While the reversal of the decision below is required for the reasons urged by petitioner, it is clear that the sound administration of justice demands that this Court instruct the Courts below as to the meaning of its language in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 2 L ed 2d 495, 78 S Ct 442, 1958 AMC 501 and restate the controlling principles for the guidance of the trial courts and for the industry itself.

The rationale of the *Weyerhaeuser* case, as well as the decision of this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 100 L ed 133, 76 S Ct

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[6] The joint nature of responsibility for the maintenance of safe shipboard working conditions in longshore operations has been recognized by Congress and by the regulatory bodies vested by Congress with interest in the area here under discussion.

The duty of the stevedore-employer to insure conditions of maximum work safety in longshoring is set forth in the 1958 amendment to Section 41 of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 941) which provides that the stevedore-employer

> "shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees."

Pursuant to the rule-making authority thus vested in the Secretary of Labor, extensive regulations bearing on longshore safety conditions have subsequently been promulgated. See: 29 CFR, Part 9 and in particular secs. 9.11, 9.12, 9.51, 9.52 and 9.53. In part, these regulations provide that, before longshore operations commence, the vessel must produce satisfactory proof that certain specified tests and inspections have been made of the vessel's cargo handling gear. A certification of inspection by an accredited ship

(Footnote continued on next page)

232 and *Crumady* v. S/S JOACHIM HENDRIK FISSER, 358 U. S. 423, 3 L ed 2d 413 79 S Ct 445 1959 AMC 580 plus a recognition of the need to encourage safety by all those connected

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inspecting agency is sufficient compliance with the regulations. (See 29 CFR sec. 9.12)

That a correlative responsibility for safety in cargo handling must rest upon the vessel owner is to be seen from the intense concern expressed by the new Coast Guard regulations bearing upon the safety, suitability and adequacy of the ship's cargo handling gear. These regulations (which will form part of 46 CFR) are set forth in 26 Federal Register (November 23, 1961) 10995-11022, and are to take effect in 1962, and thereafter. In particular, see 46 CFR Subparts 31.01 (as amended), 31.10 (as amended), 31.37 (new), 71.25 (as amended), 71.47 (new), 91.25 (as amended), and 91.37 (new). Under the above cited regulations, the vessel owner is charged with the clear duty to maintain his vessel and its cargo handling gear in such condition as will protect the life and safety of the shoreside workers who will load and unload his ship.

It is to be anticipated that the above codification will result in a sharply declining accident rate. Yet, as experience demonstrates, no code of safety regulations, however complete and however farseeing, can be the entire answer to the safety problem. Unless the written regulation be fully supplemented by a knowing and vigilant caution, by a willingness to exercise constant care in regard to those unusual, transitory or special problems which are not, or cannot be, the subject of specific regulation, the safety battle will be but half won. Alertness to special problems can sometimes best be exercised by the stevedore, sometimes best exercised by the vessel and its crew. In any event, the prime responsibility for safety should fall upon the shoulders of the party best suited to discharge that responsibility.

The case at bar exemplifies the role that vessel diligence and vessel caution, apart from regulation, must play in fostering safety. It is submitted that the substantial cause of the injury to Leighton Beard was a default on the part of the vessel's officers and crew in an area of their special skill and competence. Yet it is difficult to see how the specific conditions of peril encountered by Beard could better have been prevented by regulation than by an enlightened common sense and diligence on the part of the ship's officers and crew.

This Court now has the opportunity, by clarifying a principle implicit in its previous decisions on the interacting responsibilities of ship and stevedore, of providing the stimulus for that diligence and common sense.

with the industry, suggests a basic test for the granting of indemnity:[7]

(1) Indemnity should be granted where the substantial cause of the accident was a foreseeable injury resulting from a substandard performance by the stevedore in an area of activity wherein the stevedore's competence and skill should have been the major factor in deterring the accident.

(2) In all other cases indemnity should be denied.

A restatement of the basic rule thusly would clarify the mutual duties of shipowner and stevedore and would doubtless do much to preserve the life and health of countless shore-based maritime workers. This case presents the opportunity for such a restatement.

Conclusion

In order that shipowners may be encouraged to participate to a greater extent in safety and thus deter preventable shipboard accidents, in order to correct the misconception of some inferior courts, including the court below, that indemnity is allowable even where the substantial cause of

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[7] *Ryan and Weyerhaeuser* dealt with factual situations in which the stevedore's negligence had created the condition judged to be unseaworthy. It is not the purport of this brief to quarrel with the legal principle that where the stevedore's substandard performance *creates* unseaworthiness indemnification should ensue. It is the failure of the lower courts to appreciate the rationale of this Court's decision in *Crumady* which causes us concern. In that case the vessel was unseaworthy through the improper setting up of a cut-off switch. The District Court specifically found that "the primary cause of the parting of the topping lift" was the creation of "a load on the topping lift greatly in excess of its safe working load." Thus the primary cause of the accident was occasioned by the negligence of the stevedores which brought the unseaworthiness of the

(Footnote continued on next page)

the accident was not stevedore's negligence and to correct the injustice of depriving petitioner of its right to a jury trial, the decision below should be reversed.

Respectfully submitted,

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Dated: New York, N. Y.
December 6, 1961.

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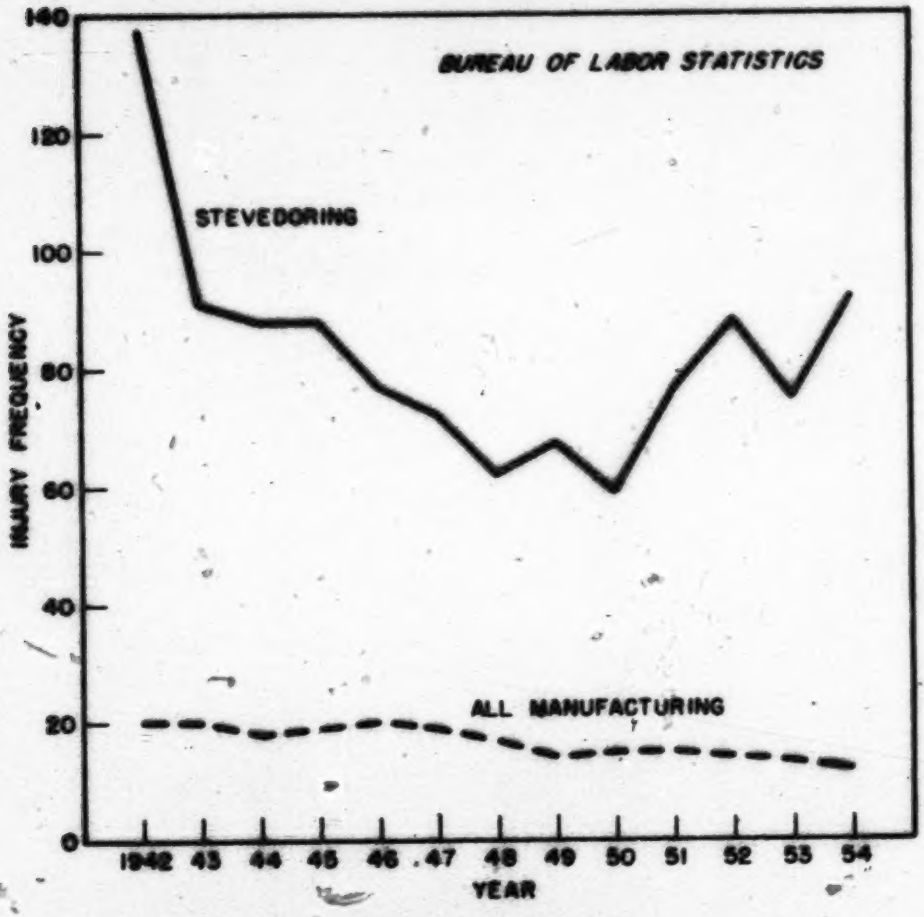
vessel into play. Neglecting entirely this Court's observation that the primary cause of the accident was the stevedore's negligence, inferior courts have been shaping a rule that interprets the Crumady language to mean that a stevedore performing any activity with, in or about an unseaworthy condition is liable for indemnity. This is the meaning of the decision of the court below in this case. See also: *Smith* v. *Jugoslavenska*, 1959 4 Cir., 270 F. 2d 176; *Weigel* v. *M/V Belgrano*, D. C. Ore. 1960, 188 F. Supp. 605.

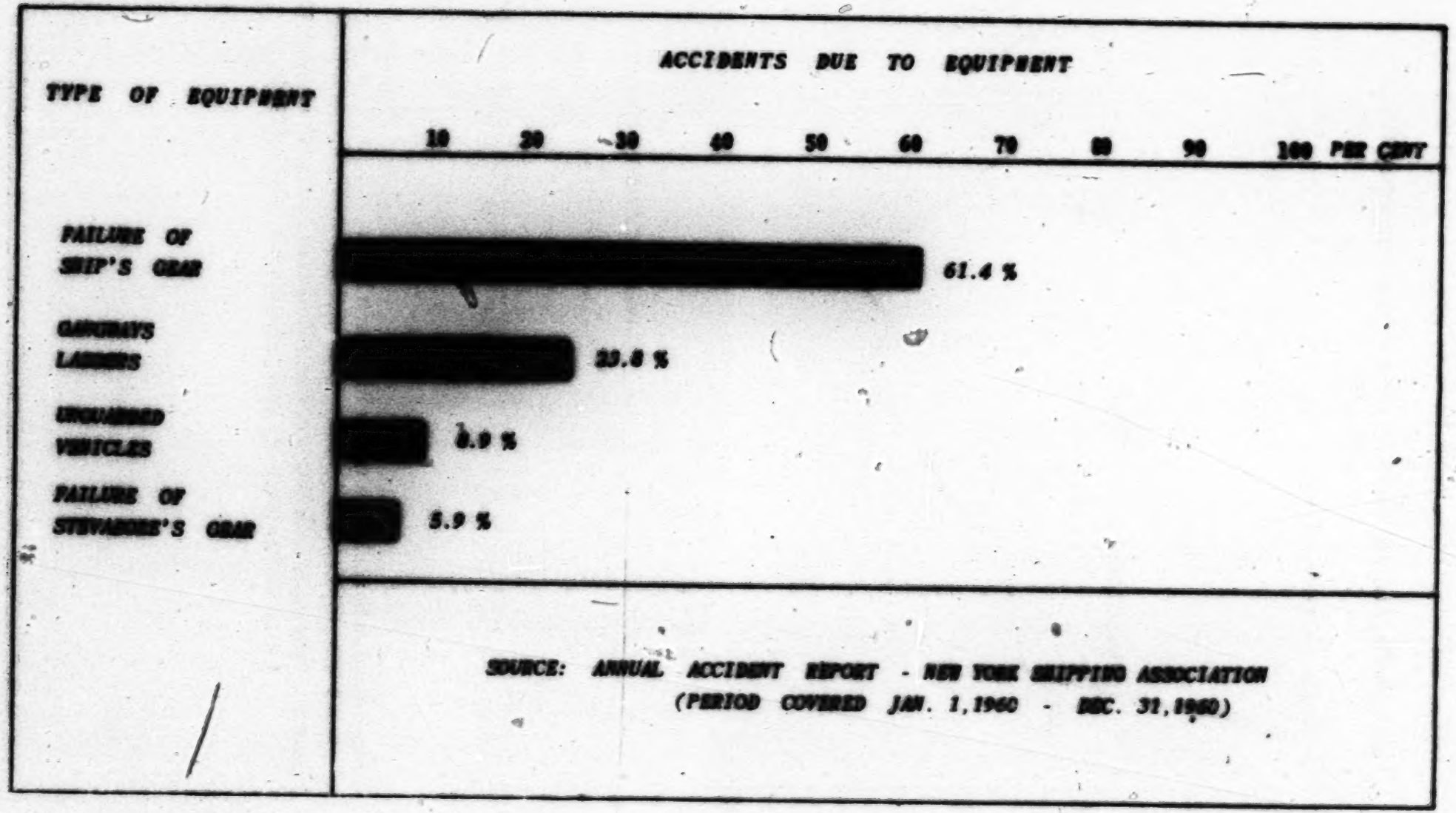
The granting of what cannot be categorized as anything but "automatic indemnity" as evidenced by these cases, is a direct result of inferior courts misunderstanding the principle that before indemnity will ensue it must be shown that the stevedore's negligence was the substantial cause of the accident.

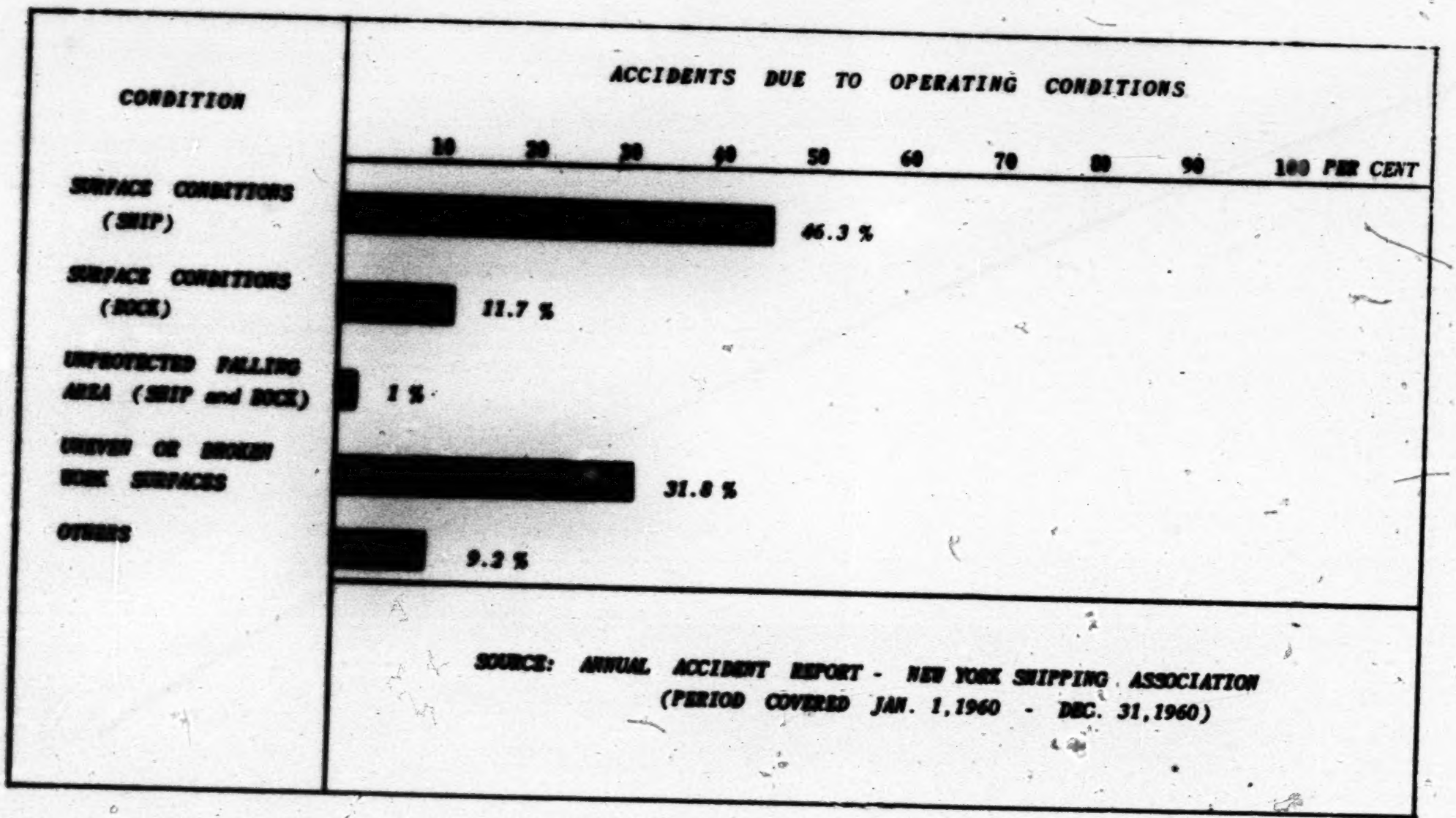
Stevedoring and All Manufacturing Injury Frequency Rates
1942-1954



Figures refer to accidents per million man-hours.

Source: "Longshore Safety Survey", National Academy of Sciences—National Research Council (Publication 488) (1956).


TYPE OF EQUIPMENT
ACCIDENTS DUE TO EQUIPMENT
10
20
30
40
50
60
70
80
90
100 PER CENT
FAILURE OF SHIP'S GEAR
61.4 %
GANGWAYS
LADDERS
29.8 %
UNGUARDED VEHICLES
8.9 %
FAILURE OF STEVEDORE'S GEAR
5.9 %
SOURCE: ANNUAL ACCIDENT REPORT - NEW YORK SHIPPING ASSOCIATION
(PERIOD COVERED JAN. 1, 1960 - DEC. 31, 1960)


CONDITION
ACCIDENTS DUE TO OPERATING CONDITIONS
10
20
30
40
50
60
70
80
90
100 PER CENT
SURFACE CONDITIONS (SHIP)
46.3 %
SURFACE CONDITIONS (DOCK)
11.7 %
UNPROTECTED FALLING AREA (SHIP and DOCK)
1 %
UNEVEN OR BROKEN WORK SURFACES
31.8 %
OTHERS
9.2 %
SOURCE: ANNUAL ACCIDENT REPORT - NEW YORK SHIPPING ASSOCIATION
(PERIOD COVERED JAN. 1,1960 - DEC. 31,1960)

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 282.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.,
Respondents.

BRIEF IN OPPOSITION TO MOTION OF THE NATIONAL ASSOCIATION OF STEVEDORES FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER.

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OCTOBER TERM, 1961.

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The respondents oppose the motion of the National Association of Stevedores [hereinafter "the stevedores"], primarily because the stevedores seek to argue matters which are not fairly encompassed within the issues which are before this Court for decision.

The brief for the petitioner is before us and presents three questions [brief for petitioner, page 2]. All deal with one phase or another of the question of the right of the court

below to set aside a jury verdict and enter judgment against the petitioner notwithstanding that verdict.

With respect to these, the points in the case, the stevedores concede that "the petitioner will adequately present" [motion, page 2, paragraph 4], the argument having to do with jury trial and the right of the court below to set aside a verdict and judgment based thereon.

Instead, the stevedores, after having disclaimed that anything in their brief will be of assistance to the Court upon the issues presented by the petitioner, seek to set up three new points which were not submitted to the jury or considered by the court below, but which the stevedores have culled from pleadings or arguments of counsel addressed to the court and, having stated these new questions [page 6], proceed to argue them. This injection of new issues not submitted for jury determination in the district court or considered by the court of appeals would require respondent, if it would answer them, to make extensive references to the record to demonstrate the fact that the points the stevedores make are really not in the case. The stevedores have taken such broad liberties with the factual background that this would impose an unfair burden upon respondent without assisting the Court to determine the issues which the case presents.

More than that, the argument which the stevedores present seems designed to attempt to grind another ax for the stevedores and to influence this Court into a position in this case which would be in direct and irreconcilable conflict with legislation of recent enactment and the regulations promulgated under that Congressional mandate. In August of 1958 Congress amended the Longshoremen's and Harbor Workers' Compensation Act and added a new section, 33 U. S. C. A. 941. The new statute imposed upon the employer the obligation of owing to the safety of his employees engaged in stevedoring and other occupations along the shores which are covered by the Act. It empowered the

Secretary of Labor to promulgate and enforce regulations for health and safety.

More recently other regulations have placed upon the Coast Guard responsibility for promulgating and enforcing regulations having to do with the ships' end of the cargo-handling operation. The latter do not take effect until 1962. See 26 Federal Register [November 23, 1961] 10995-11022.

The stevedores do not flatly state their disapproval of the division of responsibility made by these two sets of regulations, but it is clear from their discussion [page 16] that they are not "yet" [page 16, footnote] reconciled to this division of responsibility established by the regulations as between stevedore and shipowner. In short, stevedores seek to have this Court, indirectly, rule upon or otherwise make some statement which might, in future, make less burdensome to stevedores the responsibilities which the regulations have planted squarely upon them. Stevedores argue that the responsibilities imposed by the regulation are "joint" [page 15, footnote 6] when the regulations themselves delineate completely different spheres of responsibility for safety and safe operation. This is the ax the stevedores wish to grind in the present case and to have this Court point out "the necessity to place responsibility for safety" [page 11] upon the shipowner rather than upon the stevedore, the place where Congress and the regulations have in fact already placed it. That is why the stevedores argue "that the sound administration of justice demands that this Court instruct" upon the law "and restate the controlling principles for the guidance of the trial courts *and for the industry itself*" [page 15]. Emphasis ours.

It is respectfully submitted that the arguments the stevedores wish to make are arguments which should have been, and in fact were, made by the stevedoring industry and the movant itself before a Congressional Committee and before the Department of Labor. It has no proper place

in the argument of the present case and the motion for leave to file this brief amicus curiae in support of the petitioner should be denied.

Respectfully submitted,

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QUESTIONS PRESENTED.

Where the parties to an action are a longshoreman making a claim for personal injuries against a shipowner and the shipowner joining the stevedore contractor in an action for indemnity:

1. Is any Seventh Amendment jury trial right involved where the contract sued upon is a maritime contract and, additionally, the stevedore-third-party defendant has filed no demand for jury trial?

2. Where the liability of the shipowner has been determined by special verdict of a jury answering interrogatories and the charge of the court has specified particular grounds which would form a basis for answering the interrogatories [as opposed to a general verdict], should not the reviewing Court pass upon the legal questions raised by the respondent shipowners' Rule 50(b) motion?

3. If the reviewing Court finds by applying established rules of law to the evidence that all possible grounds supporting the judgment against the defendant shipowner would require that it be indemnified by the stevedore, should not it then enter the appropriate judgment as a matter of law upon the shipowners' Rule 50(b) motion?

STATEMENT OF THE CASE.

We do not differ with the broad history of the present case as outlined in the petitioner's statement except upon two points.

At page 4 of its statement, the last sentence of the long paragraph on that page is not a fair or accurate statement. It is only half correct. The sentence pertains to bales falling "while being lifted *vertically*". [Emphasis ours.] The evidence in the case is that hooks were inserted under the straps around bales which were tightly stowed in the hold of the respondent's ship. This was the petitioner's method of unloading. It had been criticized by the ship's chief officer as dangerous and was not the method used in loading.

Once the hooks were placed under the bands of the bales which were tightly packed in the stow, the bales were pulled out of place, dragged across the hold [R25a, 129a] and then lifted. The evidence was that in 3 to 5% [R89a, 131a] of the bales so handled, experience dictated that breaking of the bands occurred. Petitioner is careful to include the word "vertically", but that does not create a full or fair picture when the other facts are considered. The hooks under the bands were in place during the break-out and drag operation as well as during the vertical lift; were not removed and inserted under other bands which had not been subjected to that strain; and no inspection was made by the petitioner to see whether the bands had been damaged during the break-out and dragging operation, although the uncontradicted evidence was that one bale out of every fifty would fall during the unloading operation [R89a].

We likewise disagree with the argumentative portion of the petitioner's statement beginning at the bottom of page 5 of its brief, but do not deem this an appropriate place to state the counter arguments which are made in later portions of this brief for the respondent.

SUMMARY OF ARGUMENT.

This case does not involve any right of the petitioner to jury trial under the Seventh Amendment. Respondent asserted a claim against the petitioner under a maritime contract to perform stevedoring services. A maritime contract is a proper subject of admiralty and maritime jurisdiction under Article III of the Constitution. As such it was not a suit cognizable at common law at the time the Constitution was adopted. In addition, the petitioner did not file a demand for a jury trial under F. R. C. P. 38. Its failure to demand a jury trial precludes the raising of a Constitutional issue. *United States v. The John R. Williams*, 144 F. 2d 451 at 454; 5 *Moore's Federal Practice*, page 344, note 2; *McAndrews v. U. S. Lines Co.*, 167 F. Supp. 41.

The indemnity aspect of this maritime contract between petitioner and the respondent was not severable so as to be triable as a common law action subject to the Seventh Amendment. *American Stevedores, Inc. v. Porello*, 330 U. S. 446 at 456; *Mowbray v. Merryweather*, [1895] 2 Q. B. 640 [C. A.]. The respondent here complied with all of the requirements of F. R. C. P. 50. It moved for a directed verdict in its favor upon its cause of action for indemnity against the petitioner and the examination of the legal question thus preserved is not even arguably a violation of any Seventh Amendment right.

There was no general verdict in favor of the petitioner but an answer to interrogatories upon special verdict. The grounds upon which the jury was to answer the interrogatories submitted to it were specifically delineated in the court's instructions to the jury. Petitioner may not now look to some other possibility, the criterion of its own imagination, and seek to support the jury verdict upon a ground which was not submitted to the jury by the instructions of the trial court.

No ground is "implicit in the jury verdict" which was not encompassed within the trial court's instructions. The

petitioner does not really meet this issue, but instead argues that a line of at least four recent decisions in this Court beginning with *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*, 350 U. S. 123, and ending with *Waterman Steamship Corporation v. Dugan & McNamara, Inc.*, 364 U. S. 421, should be re-examined and reversed.

Instead, respondent urges that every permissible ground for the jury's finding of respondent's negligence *vis-a-vis* the injured longshoreman-plaintiff required, as a matter of law, that the respondent should recover a judgment for indemnity against the petitioner. This result was required by the decisions of this Court beginning with *Ryan, supra.*

Respondent points out that a number of the arguments made by petitioner are not supported—or supportable—upon the record or by reference to other authorities. With respect to the cargo which was permitted to remain in the "square" of the ship's hatch while cargo was being unloaded at Philadelphia, there is great similarity to the winch shelter which was involved in this Court's decision in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 553.

The petitioner, the expert stevedore under contract to perform services for the respondent, cannot take refuge in a plea that the ship's officers should have intervened in the petitioner's cargo discharging operation and either prevented use of the method petitioner adopted or have stopped petitioner's operations altogether. To so argue is a complete distortion of the "warranty of workmanlike service" which the petitioner owed to the respondent.

Petitioner's argument that the contract in the present case is somehow different from all of the contracts in all of the cases which have been considered by all of the other courts which have decided this question will simply not hold water. This is particularly true when, seventeen years ago, the almost identical contract was before this Court in the case of *Joseph v. John T. Clark & Son*, 330 U. S. 422, and its meaning was then clear to the stevedoring industry.

ARGUMENT.

I. This Case Does Not Involve Any Constitutional Question or Any Seventh Amendment Right to Trial by Jury.

It has been said "habit has so much overlaid our thought in many practice matters that their skeletal anatomy ofttimes becomes blurred in our minds."[1] The respondents intend to meet this case upon its merits and to demonstrate that the judgment of the court below is correct. It is not, therefore, necessary that the respondents assume the burden of establishing as an affirmative proposition that a Seventh Amendment right of trial by jury is not involved in this case. No such Seventh Amendment right is in fact involved, and we think that clarity of thought will be aided by a definition of that with which we are dealing.

Every trial before a jury in a federal court is not necessarily a jury trial guaranteed by the Seventh Amendment. "The right of trial by jury was limited to actions at common law at the time of the adoption of the Constitution." *Institutional Drug Distributors v. Yankwich*, 349 F. 2d 566 at 569; *Dimick v. Schiedt*, 293 U. S. 474 at 476. The case at bar is a suit by the respondent against the petitioner. Ellerman, the respondent, having been sued by the original plaintiff, joined Atlantic under F. R. C. P. 14. The right which Ellerman asserted against Atlantic was based upon a contract to perform stevedoring services, a maritime contract. *Atlantic Transportation Co. v. Imbrovek*, 234 U. S. 52; *American Stevedores, Inc. v. Porello*, 330 U. S. 446 at 456. That a contract to perform stevedoring services is a maritime contract has been settled at least since the decision in *The George T. Kemp*, Fed. Cas. 5341.

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1. Wooley, in *The J. K. Welding Co. v. Gotham Marine Corporation*, 47 F. 2d 332 at 330.

When Ellerman joined Atlantic as a third party defendant, it made no demand for a jury trial. Atlantic made no demand for a jury trial when it filed its answer or at any other time. See Docket Entries [R1a, 2a], and compare F. R. C. P. 38. It is "in suits at common law" that "the right of trial by jury shall be preserved, and no facts tried by a jury shall be otherwise re-examined," etc. Ellerman's claim for indemnity against Atlantic, based as it was upon a maritime contract, was "the appropriate subject of admiralty jurisdiction." *The Moses Taylor v. Hammons*, 71 U. S. 411.

> "In this view of the subject, it follows, of course, that no jury was necessary, as it was a civil cause; and that the appeal to the circuit court was regular, as it was a cause of admiralty and maritime jurisdiction." *United States v. La Vengeance*, 1 Dallas 297, 1 L. Ed. 610 [1796].

The same cause of action Ellerman asserted against Atlantic might have been asserted by it in a separate action in admiralty based upon the averment that the right sought to be enforced was founded upon a maritime contract. True it is that many causes of action having their roots in things maritime are tried on the civil side of the courts. Causes of action under the so-called "Great Lakes Statute," 28 U. S. C. A. 1873, and the *Jones Act*, 46 U. S. C. A. 688, are examples of Congressionally created rights to trial by jury. Many cases are tried at what we will call, for brevity, a Rule 39 jury trial, but it is difficult to see that a party who has not even complied with the provisions of Rule 38 has a great deal of which it may complain, let alone assert a Seventh Amendment right. *McAndrews v. U. S. Lines Company*, 167 F. Supp. 41, specifically so holds. There is an extensive discussion to the same effect, 5 Moore's Federal Practice, page 344, note 2. See also *United States v. The John R. Williams*, 144 F. 2d 451 at 454.

It may be argued, in spite of the fact that respondent's claim against petitioner was founded upon a maritime con-

tract to perform stevedoring services and therefore rooted in maritime law, that the concept of indemnity itself has its roots in the common law. This Court has already answered that argument in *American Stevedores, Inc. v. Porello*, 330 U. S. 446 at 456. In that case it had been argued by the stevedore that an admiralty court did not have jurisdiction of the indemnity provision in the stevedoring contract involved in that case. This Court discussed the question and concluded:

> "To sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. Such a provision is a normal clause in contracts to act for others and no more determines the nature of a contract than do conditions on the time and place of payment."

In addition to the reasons assigned by this court in its decision in *Porello*, the argument, if it should be made by the stevedore, is not historically accurate for there are instances of rights akin to that of indemnity in the maritime law as old as the Laws of Oleron and the Laws of Wisby. See Article V of the Laws of Oleron providing that if the mariners left the ship without the consent of the Master "and by that means she happens to be lost or damnified, they shall be answerable for the damage."[2] Compare also Article II of the Laws of Oleron and Articles XIV and XXXIV of the Laws of Wisby. The concept may have been first clearly enunciated in English law in *Hadley v. Baxendale*,[3] but was followed in English Maritime Law by the decision in *Mowbray v. Merryweather*, [1895], 2 Q. B. 640 [C. A.], which involved indemnification to a stevedore by a shipowner for damages which the stevedore had been compelled to pay one of his employees, injured by reason of a defect in a chain supplied by the shipowner to the stevedore.

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2. Vol. 30 Federal Cases, page 1172.
3. 9 EX. 341, 156 Eng. Repts. 145.

Clearly an indemnity provision in a maritime contract is not severable so as to make an action thereon one at the common law as opposed to one under the maritime law.

Our argument does not lead us to deny the propriety of this case having been tried to a jury, but only to point out that we are not dealing with a Seventh Amendment jury trial but with a trial before an advisory jury or a jury trial by consent. Since the language of Rule 39(c) would seem clearly applicable, so far as an advisory jury is concerned, whereas in order to have a jury trial by consent under that Rule both parties must give consent and thereafter the court "may order a trial with a jury," it would seem that, since no order was entered and no consent sought or given [except by implication], that the thing with which we are dealing is an advisory jury. Again, however, we are not forced to assume the burden of affirmatively establishing that position for we believe we can hereafter demonstrate that no matter which type of jury trial was involved, Seventh Amendment or Rule 39, the result below was correct and the judgment should be affirmed.

II. Appropriate Motions Under Rule 50(b) Having Been Made by the Respondent, the Legal Questions Were Preserved for Judicial Consideration and This Reservation Did Not Impinge Upon the Right of Jury Trial, No Matter What Type Jury Trial It Was, and the Court Below Was Not Only Free, But Was Bound to Examine the Legal Issues Thus Raised.

In reviewing this case in its setting it is necessary to recall that what was tried in the district court was essentially two separate causes of action, albeit the existence of the second was conditioned upon the existence of the first. The original plaintiff, an injured longshoreman, sued the respondent for personal injuries. He asserted a cause of action which was alleged to be founded upon two bases, unseaworthiness and negligence. The respondent, the original

defendant, filed its third party complaint against the petitioner, the stevedoring company which employed the plaintiff. The jury, answering interrogatories, found in favor of the plaintiff and against this respondent upon both grounds. The defendant, this respondent, had not traversed the issue of *how* the original plaintiff was injured, but it vigorously contested the legal question of its liability for unseaworthiness, and with respect to negligence asserted that the acts of which the plaintiff complained were not its acts and denied vicarious liability for them. It asserted that if, under the law, the plaintiff could recover against it, the respondent was, upon the negligence count at least, entitled to indemnity. The district court simply denied all of the post trial motions the respondent had filed.

The court of appeals found "it unnecessary . . . to consider the issue of unseaworthiness" [Opinion, R229a] but at least by footnote indicated concurrence with the view of the Second Circuit which had said "it was 'not disposed' to extend the doctrine of unseaworthiness to include 'cargo safe to handle' " [Opinion, R230a], and cited *Carabellese v. Naviera Aznar, S. A.*, 285 F. 2d 355 [1960]; cert. denied, 365 U. S. 872 [1961]. It affirmed the plaintiff's judgment against respondent upon the ground of negligence and then proceeded to examine the case wherein respondent sought indemnity from this petitioner.

The court of appeals, pointing out that error had been made in the charge of the jury [R228-229] to which exception had been taken and that a new trial would be required in any event, nevertheless reviewed the questions which had been reserved for judicial determination under F. R. C. P. 50(b).

It pointed out that respondent's liability to the original plaintiff was predicated upon the jury's answer to interrogatory No. 2 [R159a] finding Ellerman negligent. It then examined every ground of possible negligence on the part of Ellerman *which the court, in its charge, had submitted for jury determination* [Charge, R222]. These grounds were [R222]:

1. The use of the band-hook method of discharging the bales [R165a].

2. The failure of respondent's Mate to stop the discharge by such method [R166a].

3. The safe place to work theory in that respondent should have seen to it that the cargo in the center of the hatch should have been shifted or put out of the way [Charge, R166a; Opinion, R222].

The court of appeals, having examined all the possible grounds the district court had submitted as legally sufficient foundations for a finding of respondent's negligence *vis-a-vis* the plaintiff, applied to them rules of law which this Court has enunciated. Having done so, it concluded that upon all possible theories, respondent's motion for binding instructions [Point for Charge 3, R156a] should have been granted and that the district judge should have so ruled upon respondent's Rule 50(b) motion. The court of appeals therefore corrected that error and reversed as between petitioner and respondent.

The petitioner does not dispute the validity of a Rule 50(b) judgment nor say that it raises Constitutional questions under the Seventh Amendment. In effect, the petitioner shoots a sort of scatter gun; raises the spurious issue of a Seventh Amendment jury trial; and then takes off upon a vigorous but ill-conceived effort to bring about a reversal of what is now a whole line of decisions in this court upon the question of the shipowner's right to indemnity.

There was not a general verdict in favor of petitioner in this case. To determine exactly what issues a jury determines when it answers interrogatories upon a special verdict permissible under F. R. C. P. 49, it is essential to examine what issues were submitted to the jury and the charge of the court as to the issues it was submitting when the court requested answers to the specific interrogatories.

Although the charge is confusing, it is at least compact. The negligence issue was submitted to the jury as what the court said was "the second string to the plaintiff's bow" [R165a]. In just a few lines more than a single page in this record, the district court submitted the issue of respondent's negligence to the jury. It did so by paraphrasing arguments made by the plaintiff's attorney in his closing address. The first issue submitted was whether:

> (a) [the defendant failed to] "provide a safe place for this plaintiff who was injured to work; that their method of stowage, their method of pulling out this cargo, created a dangerous condition which provided a hazard to him working there." [R165a]
>
> (b) He buttresses this by saying that the chief officer, had expressed the view in his testimony that "this was a dangerous method of discharge" [Charge, R166a] and it thereby became the duty of the ship's chief officer "not only to warn them, but to stop the operation" because in failing to stop it he violated a duty owed to the injured plaintiff. [R165a, 166a]
>
> (c) Plaintiff "says further that it was negligence on the part of the steamship company to keep in a portion of the square of the hatch some New York cargo which was there; that that cargo either should have been shifted or it should have [been] put out of the way." [R166a]

The jury was not given, under the charge of the district court, any other ground which would form a basis for its finding of Ellerman's negligence. We will demonstrate that under the decisions of this court and others, an affirmative answer to such an interrogatory entitled Ellerman to the binding instructions it had requested and which the court had reserved under Rule 50(b).

Respondent's position can be stated briefly. If each and every one of the three grounds submitted to the jury by the court's charge is sufficient to form a basis for a jury

finding of negligence of Ellerman *vis-a-vis* the plaintiff, that same act breached the contractual duty which petitioner owed to this respondent to perform its operations under its stevedoring contract in a manner that this court has held such operations shall be performed. This was not "indifferen[ce] to the established basis upon which powers have been allocated between the court or jury" [Brief for petitioner, 15] but was an exercise of the judicial function which was committed to the courts under F. R. C. P. 50. It was in fact "a later determination of the legal questions raised by the motion" [F. R. C. P. 50(b)]. Surely the interpretation of rules of decision laid down by this court is a legal and not a jury question.

The court of appeals performed the judicial function, presuming that the verdict of the jury was rendered in accordance with the instructions which had been given it by the district court.

IF ATLANTIC'S METHOD OF PULLING OUT THE CARGO CREATED AN UNSAFE PLACE TO WORK, RESPONDENT WAS ENTITLED TO INDEMNITY AS A MATTER OF LAW.

Taking up in inverse order the points submitted for jury determination of the negligence question in the charge, we first discuss the unsafe place of work [R221]. If we set out the facts and the law applicable, the result will follow.

There was no evidence and nothing from which an inference could be drawn that the method of stowage was improper. Petitioner points to none because there is no such evidence. The cargo was "stowed all over the hatch just about level," [R16a] and was "stowed tight in tiers." No witness, expert or lay, criticized the way in which the cargo was stowed when petitioner's employees took "off the tarpaulins", opened the hatch and "remove[d] the beams" [R16a]. No one could fairly criticize the stow as it existed when the ship arrived and petitioner's employees took over the hold to perform their work of discharging.

"It is necessary, therefore, that every precaution be taken to prevent shifting [of cargo] of any sort [during the voyage]. The best preventive, of course, is to leave no space into which cargo may shift. It is primarily for this purpose that efforts are made to stow compactly and completely, and that dunnage is used to fill up spaces into which other goods will not go." Leeming, *Modern Ship Stowage,* Page 159, U. S. Department of Commerce.

No evidence was introduced, lay or expert, that it was in any way improper for petitioner to have the hold stowed so that approximately half of the cargo was for Philadelphia and half for another port. No one could fairly criticize that, for it is not only an approved method, but essential.

"A general rule that should be followed, unless circumstances absolutely prevent it, is to stow the cargo so that there is a fair or even distribution for each port over the different holds of the ship. For example, if there are 500 tons of cargo for a certain port to be loaded into a vessel having five holds, approximately 100 tons should be placed in each hold; not 20 tons in one hold, 250 tons in another, and so on." Leeming, *Modern Ship Stowage,* Page 107, U. S. Department of Commerce.

" 'To start with, the holds and the 'tween-decks will be divided in two, the forward parts of the forward hatches for' Point A and 'the after parts for' Point B. 'In the after compartments, the forward parts will be used for' Point B and 'the after parts for' Point A." Garoche, *Stowage, Handling and Transport of Ship Cargoes,* Page 155, Cornell Maritime Press.

There are good and essential reasons for all this. A ship must be loaded so that the whole is seaworthy. Concentration of weight, even the height of cargo, within a

cargo hold may have adverse, even dangerous, effect upon trim and upon the all important metacentric height. Empty compartments next to loaded ones result in longitudinal strains.

> "For the vessel, distribution should be made so that she is in the most seaworthy condition from departure to arrival. That is to say, the weight on board should be properly distributed for purposes of trim and transversal stability. Then it is necessary to make sure that the vessel is within the limits of difference in drafts and stability (GM) which have been fixed, as well for a long passage as for runs from port to port." Garoche, *Stowage, Handling and Transport of Ship Cargoes*, page 38, Cornell Maritime Press.

> "The point to be made here is that improper longitudinal distribution of weights does contribute to structural failures of ships." Sanerbier, *Marine Cargo Operations*, page 40, Wiley & Sons, New York.

Petitioner seems to infer that because the cargo not discharged at Philadelphia was called "New York" cargo and the ship had been to New York, there could be some inference of negligence. But there was not an iota of evidence upon that point, and in fact there could not fairly have been for reasons referred to above. True, the ship had already stopped once at New York, but from there had proceeded to Boston, then to Philadelphia, and from Philadelphia was bound for Norfolk and Baltimore before *returning to New York* to begin its outward voyage. To have removed all cargo from the forward-most cargo hold before undertaking the sea transit to Norfolk would have been grossly improper seamanship[4] and, of course, no witness

4. Compare "Proceeding of the Merchant Marine Council, U. S. Coast Guard", Vol. 18, No. 11 [Nov. 1961] where the report of Admiral Richmond into the causes of the breaking in two of the S. S. Pine Ridge states [p. 206] ". . . it is considered that the principal cause of this casualty was improper ballasting".

even suggested that it should have been done or that good practice required it.

More important, however, is the fact that there was no jury finding on this point because the court's charge did not submit that question for jury determination.

The evidence in this case was that this system of a "split hatch" was frequently encountered [as it would have to be on a ship in common carriage], and petitioner's employees "were experienced and familiar with that situation" and "knew what to do" [R33a, the testimony of petitioner's hatch boss].

Thus the district judge was correct when he refused to charge that respondent should have so arranged the stowage as not to "require either stowage to be removed" [R177a]. There was not an iota of evidence that this "split hatch" stowage was improper and in fact there could not have been. A hatch full of gunnies for Philadelphia alone might have made easier work for petitioner, but the split stow was by no means improper and no one so testified.

The charge did submit for jury consideration, however, the question of whether the cargo destined for another port "should have been shifted" or "put out of the way" [R166a]. This is a different question and respondent, having paid the judgment following denial of certiorari upon its Petition in No. 284, does not attack the negligence finding as it was submitted to the jury upon this ground. The question is, whose negligence? That brings us to the law applicable to this factual picture.

EVERY GROUND OF RESPONDENT'S NEGLIGENCE VIS-A-VIS THE INJURED PLAINTIFF SUBMITTED TO THE JURY REQUIRED PETITIONER TO RESPOND IN INDEMNITY AS A MATTER OF LAW.

Much of petitioner's argument seems directed to a veiled attack upon the line of decisions of this Court beginning with *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124. It seeks to distinguish *Ryan* and the cases

which have followed it [Petitioner's Brief, P22-38], but its brief is conspicuous by the absence of fact references to the record in the case at bar which might arguably support the distinction sought to be made. It argues, for example [Brief for Petitioner, 29], that "in *Weyerhaeuser* there was a *direct contract*," [5] but draws no distinction aside from the inference that in the case at bar there was something different. There is not. See the contract [R147a] and the third party complaint [R10a] and petitioner's answer [R12a].

Petitioner refers to the contract in the *Ryan* case as if it were different on the ground that there the stevedore "agreed to perform *all* [6] of the shipowner's stevedoring operations at the time and place . . ." [Brief for Petitioner, 24]. Does petitioner seek to infer that in the contract in the case at bar the agreement was that petitioner should perform something less than "all" of the stevedoring services for respondent? Some such distinction is necessary to the argument petitioner makes *unless* it would have this Court now reverse the entire line of cases beginning with the *Ryan* decision.

A Contract to Perform Stevedoring Services Includes the Implied Warranty of Workmanlike Service.

The line of decisions which petitioner attacks began with *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*[7] This Court said that the contract under which the stevedore in that case undertook its operations necessarily included the obligation to perform properly, safely and with competency. This warranty of the petitioner to its customer, the respondent, is of the very essence of the contract for professional services [350 U. S. 133]. The obligor under such a contract "must answer for the damage if the quality of

5. Emphasis in Original.
6. Emphasis in Original.
7. 350 U. S. 141.

the service is lower than the standard". *Schubert v. Schubert Wagon Co.*, 249 N. Y. 253 at 257 [Cardozo, C. J.]

This obligation of a contractor to perform the services it undertakes implies the promise to work competently and safely and is as much a rule of maritime law as it is of the common law. It has been said that breach of it sets up "a time-honored traditional maritime cause of action for failure prudently to perform." *Southport Transit Co. v. Avondale Marine Ways*, 234 F. 2d 947 at 951. There are a host of authorities supporting the concept of indemnity as reimbursement for damages suffered as the result of a breach of duty—usually a duty arising out of contract—owed by the indemnitee to the indemnitor.[8]

An agreement by contract to perform work carriers with it the undertaking by the party which is to be the actor that it will carry out the work in a careful and prudent manner and that it will indemnify the other party to the contract where, because of a breach of duty owing under the contract, the promisee has been subjected to liability to

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8. *Hadley v. Baxendale*, 9 Ex. 341; 156 Eng. Repts. 145;
Mowbray v. Merryweather, [1895] 2 Q. B. 640 (C. A.);
Weinstock—The Employer's Duty to Indemnify Shipowners, etc., 103 U. of Pa. L. R. 321;
Boston Woven Hose, etc. v. Kendall, 178 Mass. 232 [Opinion by Holmes, J.];
Schubert v. Schubert Wagon Works, 249 N. Y. 253 [Opinion by Cardozo, C. J.];
States S. S. Co. v. Rothschild International Stevedoring Co., 205 F. 2d 253 (C. A. 9);
Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co., 10 F. 2d 769;
Seaboard Stevedoring Corp. v. Sagadahoc S. S. Co., 32 F. 2d 886;
American President Line v. Marine Terminals Corp., 234 F. 2d 753; cert. den. 352 U. S. 926;
United States v. Arrow Stevedoring Co., 175 F. 2d 329; cert. den. 338 U. S. 904;
Calmar Steamship Corp. v. Nacirema Operating Co., 266 F. 2d 79; cert. den. 361 U. S. 816;
American Export Lines v. Revel, 266 F. 2d 82.

third persons. *Restatement of the Law of Contracts*, § 334; *Restatement of the Law of Restitution*, part 1, chapter 3, topic 3; Introductory Note, page 328, 329, § 93-96; *Restatement of the Law of Agency*, § 401(c). The maritime law is identical. *Mowbray v. Merryweather*, [1895] 2 Q. B. 640 [C. A.]; *Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.*, 10 F. 2d 769. See also this Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*, 350 U. S. 141 and the cases which have followed it, not only in this Court but in the inferior courts.

It follows under this well-established rule, therefore, that if respondent's liability to the original plaintiff resulted from the breach by petitioner of a duty owed by petitioner to the respondent, the judgment below imposing that liability for indemnity was right. It is not a jury question at all once the facts which form the basis of the imposition of liability upon the respondent have been established, if all three possible grounds upon which the jury could have made its finding within the framework of the court's charge to it lead to the same result. It is, of course, the "exclusive power" of juries to weigh evidence and determine contested issues of fact". *Berry v. United States*, 312 U. S. 450 at 453. Here, however, the facts had been established. The jury found the respondent negligent upon one of the three permissible premises for such a finding which the charge of the court submitted for jury determination. All of the grounds submitted required indemnification as a matter of law.

Since we are here examining the "safe place to work" concept and respondent's initial liability under it, an examination of what issue the charge of the court submitted to the jury for determination upon that ground is not only of assistance, it is essential. The charge instructed the jury that it could find Ellerman guilty of negligence *vis-a-vis* the plaintiff for keeping certain cargo in the square of the hatch when it "should have been shifted" or "put out of the way" [R166a].

The petitioner had undertaken to do the stevedoring work and nothing in the contract indicates any intention that it was to do *less than all of the work* which expert workmanship would require be done. If the presence of cargo intended for another port created a hazardous condition so that the portion of it in the square of the hatch should have been "shifted" or "put out of the way", does the petitioner suggest that respondent should have hired some other stevedore to perform that work? That is where its argument leads.

It is the petitioner which holds itself out as an expert in the technical side of ship loading and unloading and it is petitioner which undertakes to do that work safely, properly and in a manner "comparable to a manufacturer's warranty of the soundness of its manufactured product" 350 U. S. 133, 134. Cf. *Cornec v. Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502; cert. denied 284 U. S. 621; *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 553.

It is impossible to draw a rational conceptual difference between this case, and the basis of the possible jury finding we are here discussing, and this Court's decision in *Weyerhaeuser*. In *Weyerhaeuser*, a shelter had been built on the deck by workmen at New York. There it was "implicit in the jury verdict" that the shelter was on the ship when it arrived in Boston.[9]

Although Weyerhaeuser's liability to the injured longshoreman might have been predicated on "its failure to inspect, detect and correct the unsafe condition of the shelter, that would not prevent the recovery of indemnity" [355 U. S. at 568]. So here, the presence of the "New York" cargo, while it might have been sufficient basis for respondent's liability to the injured plaintiff, would, under *Weyerhaeuser*, entitle respondent to indemnity from the

9. It is significant for the purposes of our case to note that in *Weyerhaeuser* this Court looked to what was "implicit in the jury verdict" and, in seeking, examined the instruction of the trial court to the jury upon the point.

petitioner and this result would follow by application of established rules of law, for the jury's function had already been performed. The facts had been established, and nothing remained but application to the factual situation of established legal principles. This petitioner, having held itself out to its customer as an experienced and competent stevedoring contractor, had the duty to perform the task which it had undertaken carefully and completely. This was the very essence of its contract, and it was breached when it permitted its employees to work aboard respondent's vessel under conditions which had been made dangerous by the very operation being performed, unless, of course, the contractor "shifted" or "put out of the way" the other cargo, the presence of which created the dangerous condition. It must be kept in mind that this dangerous condition did not exist when the petitioner began its work, for then the stow of the cargo throughout the hold was level [R16a].

There is no essential difference between the action of this petitioner in permitting its employees to work in a place which became unsafe as the work progressed (in the absence of shifting of other cargo) and the action of the stevedore in *Weyerhaeuser* in permitting its employees to use the shelter without inspecting it and correcting any dangerous condition found to exist. There is no essential difference between this case and *American President Line v. Marine Terminals Corp.*, 234 F. 2d 753; cert. denied 352 U. S. 926, where the stevedore was held liable to indemnify because it had continued its cargo operations in the vicinity of a beam, the safety latch of which was missing or broken, after it had knowledge of the unsafe condition. In the case at bar, since the cargo "was stowed all over the hatch just about level" [R16a] when the petitioner began its operations and the work it was performing of removing Philadelphia cargo was the thing which brought about the unevenness or ledge, it, under the hypothesis we are discussing, made the place of work hazardous and unsafe because such other cargo as extended into the "square of the hatch"

was not "shifted" or "put out of the way". It was petitioner, the "expert", which not only had firsthand knowledge of the condition but it was in the best position to recognize the potential hazard it created. The breaking of bands upon the bales was foreseeable under the testimony of petitioner's own witness, Wheeler [R128(b), Opinion, R224]. Petitioner's conduct came close to recklessness when it is considered that the evidence of its own employees indicated that no one had ever shown the men how the work should be performed properly [25a, 26a, 47a, 55a and 56a], although petitioner was the only company for which these men unloaded the particular commodity in question [37a] and petitioner's practice was to "break" the bales out of tight stow, drag them across other cargo in the hatch and then raise them vertically without changing the position of the hooks, inserting the hooks in different bands which had not been subjected to that strain or taking any other precaution by way of inspection [25a].

Under hypothesis #3 in the court's charge to the jury, the "safe place" theory, it seems abundantly plain that the petitioner breached its contractual duty owed to the respondent as that duty has been defined by this Court. The measure of damages for that breach is reimbursement to the respondent. It is generally recognized that reimbursement is the proper measure of damage where a breach of contract foreseeably subjects the customer to liability to others. *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co., supra; McFall v. Compagnie Maritime Belge,* 304 N. Y. 314 at 330. See also the authorities cited in footnote 9.

THE USE OF THE HOOK-UNDER-BAND METHOD OF DISCHARGING AND THE FAILURE OF THE SHIP'S OFFICERS TO PREVENT THE STEVEDORE FROM USING THAT METHOD OF DISCHARGING WOULD REQUIRE INDEMNIFICATION IF RESPONDENT'S ORIGINAL LIABILITY WAS PREDICATED THEREON.

The same decisions, particularly decisions by this Court, which have already been cited are equally applicable here. In *Ryan v. Pan-Atlantic*, the argument was advanced that the ship's officers in that case failed to discover and correct improper stowage. This Court said:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." 350 U. S. 134, 135.

As the court below points out "it was" petitioner's "method of pulling out the cargo, not" respondent's [Opinion, R223]. The ship was under no duty to tell the stevedore anything it would know if it knew its business. *Hastorf Contracting Co. v. Ocean Transportation Corp.*, 4 F. 2d 583, affirmed 4 F. 2d 584:

> "The stevedoring company owes to the vessel and her owners due care in the loading; but the vessel and her owners owe no such duty to the stevedoring company." *Cornec v. Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502; cert. denied 284 U. S. 621.

The *Cornec* case was cited with approval by this Court in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355

U. S. at 568. It is the stevedore who is in charge of the operation, and the ship's "master had no duty or right to supervise as to the instrumentalities adopted and methods used". *Cornec v. Baltimore & Ohio R. Co., supra.* The ship's officer here did all that he was reasonably required to do when he suggested to one of petitioner's supervisory employees that the unloading should not be carried out in the manner in which it was being performed because of the danger involved [R66a]. It is plain that the ship's officer did not "consider it safe, however, I am not a stevedore" [R69a].

Some of petitioner's argument seems to be predicated upon the proposition that the ship's officer owed a duty to petitioner to compel petitioner to stop the work instead of merely "suggesting" that it be performed differently. But this is not a duty respondent owed to the expert stevedoring contractor which had undertaken to perform the work of unloading. Otherwise the non-expert would be extending a warranty to the expert. If petitioner warranted "workmanlike service" and cannot use respondent's failure "to discover and correct" [*Ryan*] an unsafe condition or require an independent stevedoring contractor to perform the work in a particular manner, then petitioner's argument leads it to unsound ground. Petitioner is, in effect, arguing that the respondent owed petitioner a duty to "shift" or "put out of the way" the bales which made the workplace hazardous, but this is not in accordance with the contract nor is it possible in a practical sense. Ship's officers and crew members are engaged in navigation. Cargo cannot be satisfactorily handled at sea. Nor was the respondent required to hire another stevedoring contractor to perform the work which the petitioner was obligated to perform under its contract.

Petitioner even suggests reversal [Brief, page 35] upon the ground of incomplete draftsmanship. Petitioner suggests that the contract does not designate with specificity those areas of responsibility as between the stevedore and shipowner. The argument is spurious.

If the Court will refer to the cases of *Carter & Weekes Stevedoring Company* and *Joseph v. John T. Clark & Son*, Nos. 29 and 30, October Term, 1945, 330 U. S. 422, it will find reproduced beginning at page 85 of the record several contracts for stevedoring services between shipowners and other companies within the same industry. Oddly enough Exhibit 9, page 89 of the record in that case, is a contract wherein Ellerman & Bucknall Steamship Company is a party. That company is the one which entered into the contract now before this Court in the case at bar. See the record in this case, R147a.

In the *Joseph* case, the stevedoring industry was seeking exemption under the Commerce Clause of the Constitution from locally imposed taxation. The stevedore's argument in that case was that contracts, in all important respects identical with the contract in the case at bar, constituted the stevedore an integral part of the transportation process. The contract there and the contract here contained identical wording. In each, the stevedore:

> "Shall take the delivery of goods whether by land or by water at the point where the shipper is bound to deliver them . . . ; transport the cargo to and load on board carrying steamers with all due dispatch and safely and properly stow same . . . etc." [R147a]

On arrival of a ship for unloading, the stevedore:

> "Shall break out, discharge and place the cargo on the wharf or into craft as required, etc." [R147a]

The stevedore in that case did not have any doubt that it took over and performed for the steamship company the entire operation and that "during the course of respondent's operations, respondent assumed responsibility for all damage to or loss of freight, injury to its own employees, and to third persons and damage to the ship". See Brief

for Respondent in No. 30 October Term, 1945, page 3. The respondent here urges precisely the same interpretation of this substantially identical contract as the stevedoring industry placed upon the contract when the situation was reversed so far as benefit to the litigant was concerned. If that was a correct interpretation of the contract in 1945 when the stevedoring industry sought exemption from locally imposed taxation upon the ground that it was exempt under the Commerce Clause, it is still a proper interpretation of the contract today. Under it the judgment below should be affirmed.

Joseph v. John T. Clark & Son, 330 U. S. 422, is interesting also in the light of the argument of ambiguity which petitioner makes in reliance upon what we conceive to be a misinterpretation of this Court's decision in *American Stevedores, Inc. v. Porello,* 330 U. S. 446.

The decisions in *Porello* and in *Joseph* were handed down the same day and both were written by Mr. Justice Reed. In *Porello* it is true that the Court remanded the case to the district court because of a contention made by the stevedore in that case that there was ambiguity in the contract which was before the Court in *Porello.* There is no suggestion in the opinion in the *Joseph* case, however, that there is ambiguity and it is not to be presumed that the Court, interpreting two stevedoring contracts in decisions handed down the same day, would ignore possible ambiguity in one while remanding the other to clear up alleged ambiguity. In this connection it is interesting to note that upon remand the stevedore which had alleged ambiguity was not able to produce any evidence of it and Judge Kaufman, interpreting the contract, held that it required the stevedore there to indemnify the shipowner. *Porello v. United States et al.,* 94 F. Supp. 952 at 954.

What has been said disposes largely of the petitioner's argument [Brief, 31, et seq.] that this Court has never defined "what conduct of the shipowner will bar indemnity". If the contract here is as clear as the stevedoring

industry successfully argued it was in the *Joseph* case, then the case at bar does not present a factual situation appropriate for consideration of the question of what conduct of the shipowner will bar indemnity. *Ryan; Weyerhaeuser; Crumady v. J. H. Fisser*, 358 U. S. 423; *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U. S. 421, and a host of lower court decisions[10] have already held that the shipowner is entitled to rely upon the expertise of the stevedore and the shipowner's failure to discover and correct a dangerous condition created during the course of the work is not such conduct as bars the right of indemnity based upon improper performance by petitioner of its contract with the respondent. This is true no matter whether the negligence which fastened liability upon respondent to the original plaintiff was the failure of the mate to stop the work; the method of attaching hooks under the bales; or the failure to shift the cargo remaining in the hold and intended for delivery at another port. Since "when" the stevedore "takes control, the cargo is already in movement and never stops while" the stevedore "handles it" and "it is not even arguable that there is any interruption in the continuity of the transit" [Brief for Respondent, No. 30 October Term, 1945, pages 25 and 26], it comes too late for the stevedore to argue that under this contract the respondent owes the petitioner any duty to supervise the petitioner's work or correct any condition which the petitioner as an expert should itself either prevent, or discover and correct.

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10. Among others see *American President Line v. Marine Terminals Corp.*, 234 F. 2d 753; cert. denied 352 U. S. 926; *U. S. v. Arrow Stevedoring Co.*, 175 F. 2d 329; cert. denied 338 U. S. 904; *Calmar Steamship Corp. v. Nacirema Operating Co.*, 266 F. 2d 79; cert. denied 361 U. S. 816; *American Export Lines v. Revel*, 266 F. 2d 82; *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181.

REBUTTAL TO PETITIONER'S BRIEF.

Assuming, arguendo, that in the district court this case had a trial by jury under Rule 39(c) by consent and order of court, in which case the "verdict has the same effect as if trial by jury had been a matter of right" [F. R. C. P. 39(c)], there is nothing requiring another trial of the issues between respondent and petitioner for the jury verdict established the factual basis for a judgment of indemnity as a matter of law.

After devoting forty pages of its brief to arguing the case which was actually presented, at page 41 of the petitioner's brief an entire new concept is injected. It is argued, for example, that respondent's negligence might have been found by the jury to have resulted from "the ship's failure to examine the bands of the bales at the time of stowage in India" and injects the "unseaworthiness" concept which was considered and rejected by the court below. Such argument ignores the fact that it has been established that respondent's initial liability to the injured plaintiff was predicated upon negligence by the court below which rejected the concept of "unseaworthiness" as a ground for liability. In so doing, it indicated its accord with the Second Circuit's decision in *Carabellese v. Naviera Aznar S. A.*, 285 F. 2d 355, and indicated it also "was 'not disposed' to extend the doctrine of unseaworthiness to include 'cargo safe to handle' " [Opinion, R230].

This portion of the petitioner's brief completely ignores the record in the case at bar. More than that, it argues a series of cases decided under state law [Brief, 43] which, on the subject of indemnity under a contract is quite different than the federal maritime law which this Court and other federal courts have enunciated. It cites and relies upon several cases from the Third and Ninth Circuits [11] which have been specifically disapproved by other courts.

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11. *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477; *United States v. Harrison*, 245 F. 2d 911; *Amerocean Steamship Co. v. Copp*, 245 F. 2d 291; *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32; petition for cert. pending 582 October Term, 1961.

In *Revel v. American Export Line*, 162 F. Supp. 297 at 288, the court said: "The indemnity feature in *Hagans* [12] appears to have been discarded." See also brief for the United States as amicus curiae (page 8) in *Weyerhaeuser v. Nacirema*, wherein these cases [with the exception of *Hodgson*] are cited and the brief states that these decisions "indicate that other courts of appeals have had difficulty in applying the teachings of this Court in *Ryan v. Pan-Atlantic.*" The petitioner's arguments on this point indicate confusion on the part of petitioner in differentiating between indemnity for breach of a duty imposed by contract and indemnity upon "the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence" [*Weyerhaeuser v. Nacirema*, 355 U. S. at 569]. This Court was at pains to point out in its decision in the *Weyerhaeuser* case that such theories were inappropriate "in the area of contractual indemnity".

At no place in its brief does petitioner really come to grips with the case which is before the Court. It nowhere recognizes that the charge of the court to the jury predicated a finding of respondent's negligence *vis-a-vis* the plaintiff upon an affirmative answer to any one of three theories submitted for jury consideration by the court's charge. Consequently it never argues that there was a view of the facts upon which the jury's finding of respondent's negligence could have been predicated without also finding that the stevedore failed to exercise that reasonable care which the law requires he shall exercise if he is to perform properly his contractual undertaking. The petitioner ignores completely the fact that the jury's answer to the interrogatory, asking the jury to determine whether respondent's fault arose "out of any failure on on the part of Atlantic and Gulf Stevedores to do its work in accordance with the contractual obligation" was predicated upon a charge which instructed the jury

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12. See Note above.

> "if there is any liability which" respondent owed to the plaintiff "that condition was *created* by Atlantic and Gulf Stevedores. That is your criterion: Did the Atlantic and Gulf Stevedores *create* the condition which made Ellerman Line and the City Line responsible to the plaintiff"? [Charge of the Court, R172a] [Emphasis ours.]

The negative answer to such an interrogatory is necessarily meaningless in view of the other answers of the same jury to interrogatories. The only factual findings to which petitioner can point is that it did not create the condition and that, as we have demonstrated, is not the criterion. See *Crumady v. The J. H. Fisser*, 358 U. S. 423, where this Court held that the act of the stevedore, which merely brought into play an unseaworthy condition of the vessel itself, amounted to a breach of the warranty of workmanlike service owed by the stevedore to the shipowner and imposed the obligation to make the shipowner whole.

Much of the petitioner's argument necessarily implies that the series of decisions of this Court beginning with *Ryan*, were incorrectly decided, for, argues the petitioner [Brief, 25], there was no express assumption by the contract of the duty to indemnify and, therefore, "there can be no action for indemnity" [Brief, 25]. The petitioner is under a misapprehension. For its failure to properly, reasonably and safely perform the work it undertook, breach of its contract results and from this breach contractual indemnity follows. This portion of petitioner's brief impliedly admits that we are dealing with a legal question and not a fact question, for interpretation of a contract is always a matter of law for the court and not a question of fact for jury determination.

This Court's decisions in *Weyerhaeuser* and *Crumady* are sufficient answer to petitioner's argument that negligence of the shipowner such as was involved here would be conduct "sufficient to preclude recovery" [Brief for Petitioner, 31]. The negligence of the shipowner in *Ryan;*

Weyerhaeuser and *Crumady*, was, in each case, sufficiently a "substantial factor". There had to be negligence of the shipowner amounting to a "substantial factor in causing the injury" in order to impose liability upon the shipowner initially in each of the cases just mentioned, yet each held that, because of the existence of the contractual relationship, the breach of the contract called the doctrine of contract indemnity into play in spite of the fact that the shipowners had breached duties owed to the injured man. The duties owed by the shipowner to the injured man are not the same as the duties petitioner owed the respondent and *vice versa*.

Petitioner makes the "written contract" argument but in order for that to succeed there would have to be a holding that because the contract was written the petitioner owed the respondent some duty of exercising less than due care in performance of the contract. That, of course, would be contrary to all of the decisions upon the point.

The petitioner seeks to resurrect the doctrine that since it is subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq. it is thereby immunized from all other forms of liability under contract. That argument was forcefully made to this Court in *Ryan* and rejected. The same arguments which petitioner makes, founded upon *Halcyon Lines v. Haenn Shipcoiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277 (1952), were made and considered by this Court in *Ryan* and rejected. The petitioner here has not been held liable in contribution; and the respondent never sought contribution, it sought indemnity. Negligence of the respondent *vis-a-vis* the original plaintiff is not germane to the question of whether the petitioner has performed properly the duties it owed to the respondent by reason of the contract relationship existing between those two.

RESPONDENT'S REPLY TO BRIEF FOR AMICUS CURIAE.

It is not surprising that the National Association of Stevedores files a brief in support of the petitioner, for the petitioner is a wholly owned subsidiary of the John W. McGrath Corp., "one of the largest stevedoring firms in the world" [R83a, 84a]. What is surprising is that the brief of amicus opens up the field of safety and division of responsibility as between shipowner and stevedore, fields in which the stevedoring industry is, by reason of its record and recent Federal regulations, particularly vulnerable. Before discussing that point, however, we discuss briefly what amicus refers to as the three claims of the plaintiff against the vessel on the ground of negligence [Brief for Amicus, page 6].

a.

Amicus first suggests that the respondent breached some duty it owed to the plaintiff when it failed to inspect the bands around the bales when the cargo was being loaded in India. This is a field in which the courts are not free, as they otherwise might be, to write upon a clean slate. The respondent is a common carrier and the cargo here in question moved subject to provisions of the Carriage of Goods by Sea Act, 46 U. S. C. A. 1300, et seq. That Act was passed as the result of an International Convention [Brussels, 1924]. Most of the commercial nations of the world passed similar legislation. Under these acts, the carrier is required to accept cargo and issue a bill of lading if the cargo tendered is in apparent good order and condition [46 U. S. C. A. 1303(2)(c)].

Such legislation would seem to preclude the argument that respondent could or should have rejected cargo simply because it had reason to believe that the expert stevedore

in the United States would place hooks under the bands during discharge. Surely a duty owing by respondent to petitioner cannot be thus forged out of mere argumentative suggestion, without evidence.

The way in which amicus suggests [Brief, p. 7] the jury's answer to the interrogatory favorable to petitioner should be reconciled would compel a conclusion that the jury applied law to the evidence which had not been part of the court's instruction to it. When it is considered there is no evidence on the point, lay or expert, and nothing about the point in the court's charge to the jury, it is not conducive to clarity to suggest that "something", [anything?] might support the jury's finding. Amicus may as well suggest some other arbitrary standard, such as the fact that the mate was a red-haired Irishman, as to argue seriously to this Court that a jury is free to impose its own arbitrary standards of conduct outside the legal principles given to the jury by the court's charge.

b.

Earlier in this brief we demonstrated that there was no evidence which would have supported a charge of vessel negligence, because cargo denominated "New York cargo" remained in the vessel while it was in Philadelphia. We pointed out that there are good and sufficient reasons why cargo compartments, particularly those at the very ends of the vessel, may not be empty in order to prevent what is technically known as "hogging" and consequent strain upon the ship's structure.

c.

Amicus' third argument on this point is that the respondent should have directed the petitioner, the expert stevedore, to cease work. No one has ever said that the condition was "irremedial" as amicus tags it. In fact, the charge of the court [R166a] suggested that there might have been a finding of negligence because this cargo was not "shifted" or "put out of the way."

The Problem of Safety Is, of Course, Important but Legislation and Regulations Promulgated Pursuant to That Legislation Have Already Entered the Field. This Court Should Not Take An Opposite Course.

We, of course, do not dispute that admiralty law is primarily judge-made law and that the policy of the law, including Congressional policy, has been in the direction of safety. On this score, the stevedoring industry is peculiarly vulnerable. The National Safety Council, *Report of Three Year Injury Rates, Reports to N. S. C., 1958-1960,* pages 36 and 37, shows that the rate of accident frequency for the stevedoring industry is 35.81 per one million man hours, about three and a half times the frequency rate for injuries on board cargo vessels and tankers, for which the same study shows a frequency rate of 9.98. The frequency rate for injuries aboard cargo vessels and tankers approximately equates the frequency rate for work injuries in the coated and glazed paper industry [9.96], whereas the accident frequency rate for the stevedoring industry exceeds that of logging [30.74].

The statistics which amicus cites—in an attempt to be objective and helpful, we are sure—are highly selective, for it has compared stevedoring with "all manufacturing" [Exhibit A-1 to Brief for Amicus]. However, it might have been more helpful had amicus referred the Court to the 1960 National Safety Council Report and made a comparison of stevedoring with "all industries" and not merely with manufacturing [1960 Report, National Safety Council, page 26]. To select "all manufacturing" is to include occupations [manufacture of ladies dresses would be an example] which do not afford a useful basis for comparison.

The recent regulations promulgated by the Bureau of Labor Standards of the Department of Labor, pursuant to 33 U. S. C. A. 941 [1958], place responsibility for safety squarely upon the employer. Under 29 C. F. R. 9.1 it is the employer who shall install, furnish and use safeguards.

Under 29 C. F. R. 9.3(d) masters, officers and crew members are specifically exempt. Section 9.4 imposes penalties upon the employer. It places the onus upon the employer to see that the ship's gear which is used is properly certified.

These regulations, in conjunction with the companion Coast Guard regulations applicable to ships, 26 Fed. Reg. page 1100-8 [Federal Register for November 23, 1961] provided [Section 31.01] for the testing of the ship's gear and issue of certificates; § 31.37-1 provides for periodic examination of ship's gear, and § 31.37-85 places upon the shipowner responsibility for having these tests conducted.

This is the delineation of responsibility which has been adopted. It is apparently unpalatable to amicus, for its long footnote 6 on pages 15 and 16, indicates reservation upon several points. It was to the employing stevedore, not the ship, that the Department of Labor issued "2506 notices of violations."[13] These "2500 unsafe conditions" were in violation of the longshoring and safety and health regulations.[14] After regulation was imposed (in March, 1960) upon the stevedore but before it was imposed (in 1962) upon the shipowner, the same report indicates [page 13]:

> "The 1960 Longshoring fatality rate has shown a 45% reduction from that of the previous year."

Amicus quarrels with success when it advocates that this Court, in a judicial decision, should now intrude upon a day to day operating program and relieve the stevedoring industry of some of the responsibility regulation has imposed upon it. Amicus' remedy suggests the ship's officers should now be made "experts" [Brief for Amicus, page 13] and direct the expert contracting stevedore to cease work because its operations have created a hazard.

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13. First Annual Report, Public Law, 85-742, Safety and Health Administration, U. S. Department of Labor, Bureau of Labor Standards, page 14.

14. Id. page 17.

For hazards having to do with the ship's gear, winches, hatch covers, etc., the newly promulgated Coast Guard regulations are the answer the experts in the field have devised to reduce accident frequency where ship's gear is involved. The regulations of the Bureau of Labor Standdards are the solution which the experts in the field have determined are best applied to and by the industry which amicus represents.

A ship's captain or mate is an expert navigator. He must be familiar with the wind, weather, tide, ship handling, the rules of the road at sea, ship's stability and structure. Heavy responsibilities are imposed upon him for the health and welfare of his crew and passengers. He must be an expert in the care and ventilation of cargo during carriage, with the propensities of hygroscopic commodities as well as of those commodities subject to damage by atmospheric changes producing ship "sweat". Now the stevedoring industry would make him also become an expert in that field of materials handling in which the stevedore specializes. Truly there is a limit to the expertise which may reasonably be required of a ship's officer.

The courts have imposed shipowner responsibility for failure of ship's equipment [*Seas Shipping Co. v. Sieracki*, 328 U. S. 85]. Whether to protect the stevedore against the claim for indemnity or to recover, under principles of subrogation, the workmen's compensation the stevedore has been required to pay to its injured employee, the industry now seeks to divest itself and to place upon the shipowner the responsibility which the regulatory agency, under Congressional mandate, has placed upon the stevedore.

Amicus refers to certain reports of the New York Shipping Association and reproduces them as an appendix to its brief [A-2, A-3]. They are headed, respectively, "Accidents due to equipment" and "Accidents due to operating conditions".

New York Shiping Association is an organization of stevedores. We do not know how objective the statistics

are or how large a segment of all accidents is involved. In contrast, the Bureau of Labor Standards Report showing number and percentage of all longshoring accidents, and comparing this with the North Atlantic Area [including New York specifically] is reproduced [15] at the end of this brief. In the over-all, it would seem to indicate quite a different picture.

CONCLUSION.

The court below properly applied established rules of decision to a fact situation as established by the judgment that respondent's liability was based upon negligence. Petitioner does not suggest how, at a new trial (which would be required under the opinion of the court below finding error in the charge to the jury [R229]), there would be any jury issue as between respondent and petitioner. No matter upon which ground the jury found respondent negligent, under the law all lead to indemnity as a matter of law. There is not factual or testimonial dispute requiring jury solution.

The judgment below should be affirmed.

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15. P. 21 of the Report cited at fn. 13 *supra*.

NORTH ATLANTIC AREA
LONGSHORING INJURY EXPERIENCE

Number and Percentage of All Longshore Injuries Reported in 1960

	Injury-type category	All injuries* reported		Number of injuries occurring and percentage distribution within area				
		National experience		Area experience		District distribution		
						Percent		
		Number of injuries	Percent of injuries	Number of injuries	Percent of injuries	Boston	New York	Philadelphia
1	Handling objects	8,476	28.0	2,332	23.5	18.7	24.7	21.7
2	Falling objects	4,180	13.8	1,633	16.5	17.4	16.1	17.4
3	Falls of persons	3,509	11.6	1,408	14.2	9.9	15.3	12.0
4	Moving objects	3,099	10.2	1,115	11.1	5.2	14.7	0.5
5	Stepping in or on objects	3,058	10.1	783	7.9	9.7	8.0	6.5
6	Striking against objects	2,228	7.3	782	7.8	8.9	8.6	6.5
7	Flying objects	2,034	6.7	713	7.2	17.2	5.0	10.4
8	Handtools	1,399	4.6	536	5.4	4.2	4.2	11.0
9	Others	2,189	7.3	606	6.1	8.6	3.9	13.6
Totals	Number of injuries	30,172		9,908		1,032	7,144	1,732
	Percent		100		100	100	100	100

*Source: 1960 injury data reported by the Bureau of Employees' Compensation on Form SD-1 (202).

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 282.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Brief for the Petitioner.

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ARGUMENT.

I. Petitioner Has Properly Raised a Constitutional Issue Under the Second Provision of the Seventh Amendment.

The argument of Respondent that this case does not involve any constitutional question or any Seventh Amendment right to trial by jury is without foundation.

We have presented to this Court as to the Seventh Amendment solely the question of whether the decision of the Court below reversing a judgment entered upon the unanimous verdict of a jury violates the provisions of the Seventh Amendment which provides that ". . . no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law" there being no rule of law making such a finding by the jury improper. (See First Point, Petitioner's Brief, p. 13 et seq.) No issue is here involved as to a denial of a jury trial.

A jury did try the facts in the instant case. No one ever challenged the right to have the case tried to a jury and Respondent does not deny the propriety of this case having been tried to a jury (See Respondent's Brief, p. 8).

Plaintiff demanded a jury trial (R. 5a). Respondent's Complaint against Petitioner incorporated Plaintiff's Complaint, including the demand for jury trial, by reference and made it part of its Complaint (R. 10a). A timely demand for jury trial having been made, all other parties in the action who were affected by the demand were entitled to rely thereon, and were not required to make a demand for issues embraced therein. The Plaintiff's demand for jury trial, once made, could not be withdrawn without consent of the parties (Rule 38(d) F. R. C. P.).

Respondent's attempted distinction created by its own language, between a so-called "Seventh Amendment jury trial" and a so-called "Rule 39 jury trial" is not valid or pertinent. Moreover, even if it was, for purposes of argu-

ment, a so-called "Rule 39 jury trial" that rule provides that it has "the same effect as if trial by jury had been a matter of right" (Rule 39(c) F. R. C. P.). The Petitioner's right to a trial by jury in the particular action involved cannot be disputed. Neither the Seventh Amendment nor the rules of procedure can create a right to trial by jury. The right to trial by jury is derived from the fact that the first Judiciary Act, which distributed the judicial power over maritime matters among the courts, contained (Section 9, 1 Stat. 76) a proviso "saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it". The proviso is now incorporated in slightly different form in 28 U. S. C. Sec. 1333. Then and now, suit could be brought by the Plaintiff seaman in personam in common law, providing requisite diversity existed. When so brought a right to trial by jury existed as a matter of right and still exists as a matter of right. *Leon v. Galceran*, 11 Wallace 185; *Doucette v. Vincent*, 194 F. 2d 834; *Williams v. Tide Water Associated Oil Co.*, 227 F. 2d 791, 793 (cert. den., 100 L. Ed. 834). An incident to the diversity jurisdiction based on the common law remedy saved to suitors by the Judiciary Act of 1789 as revised in Section 1333 of the current Judiciary Act is the right to trial by jury under the Seventh Amendment and the Federal Rules 38a. The suit here involved and tried by the jury was a civil action, based solely on diversity (R. 217) and involving as to the indemnity claim between Petitioner and Respondent solely common law rules of law. The right asserted by Respondent to indemnity was not maritime in character. Admiralty normally has no jurisdiction of the non-maritime features of the involved contract and the character of the litigant does not confer jurisdiction. Such jurisdiction must be found in the cause of action or the nature thereof: *Grant-Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 476, 66 L. Ed. 321, 324; *North Pacific SS Co. v. Hall Bros. Marine SS Co.*, 249 U. S. 119, 63 L. Ed. 510.

The *Porello* case does not decide otherwise, the Court there saying *"although admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful"* it would be unwise procedurally to sever them for purposes of litigation (p. 456 of 330 U. S.). See also *Pillsbury Flour Mills Co. v. Interlake SS Co.*, 40 F. 2d 439; *The Richard Winslow*, 71 F. 426, 428, where it is held that the breach of a contractual obligation which is not maritime may not be the subject of a suit in admiralty.

The foregoing observations are made in reply to Respondent's contentions in its first subdivision of argument. We do not intend to raise such issues not encompassed within the Petition for certiorari. We suggest instead that the maritime or non-maritime nature of the cause of action here involved is not pertinent to Petitioner's right to assert a violation of the second portion of the Seventh Amendment. The prohibition of that portion of the Amendment is intended to apply to all federal courts as to facts found by a jury in a court of record, wherever situated, and of whatever jurisdiction.

See *Justices of The Supreme Court v. U. S., ex rel. Murray*, 9 Wallace 274 (1870);
Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 242.

It is clear, from the cases just referred to, that the second clause of the Seventh Amendment which is involved in this proceeding, should be read as a separate "substantial and independent clause" not related to the trial by jury as provided for in the previous clause. Referring to *Parsons v. Bedford*, 3 Pet. 447, 448, this Court in the *Murray* case (*supra*) points out that Mr. Justice Story in delivering the opinion of the Court, referring to the second clause of the Amendment observed "that it should be read as a substantial and independent clause" and that it was a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner." and adds "The history of the Amendment confirms this

view." This prohibition as we have demonstrated in our Brief, the Court of Appeals violated.

Whether or not Petitioner was negligent or in breach of its contractual duty to the Respondent was a matter properly submitted to the jury and the jury verdict in its favor on these issues is amply supported by the evidence. The Court of Appeals erred in granting judgment of indemnity as a matter of law and should be reversed.

II. Respondent Failed to File a Motion for Directed Verdict as Required by Rule 50(b), and, Erroneously Assumes That the Lower Court Was Bound to Examine the Legal Issues Purportedly Raised.

The Brief for Respondent, in the argument presented under its second and third questions, assumes that the Respondent shipowner filed a motion for a directed verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure as to Petitioner.

The fact is that no such motion under Rule 50(b) was ever filed by Respondent either as to the Petitioner or the Plaintiff in the action. No such motion is reflected in the docket entries (R. 1a-4a) and a thorough and exhaustive review of the original transcript fails to reveal that any such motion was made or filed with the trial judge. Respondent merely made an oral motion to dismiss Plaintiff's case (original record N. T. 527, 528) at the close of Plaintiff's case and renewed this motion only as to Plaintiff at the close of all the evidence (original record N. T. 1113).

As to Petitioner, Respondent relied, at all times, solely upon its point for charge #3 (R. 156a) which asked for binding instructions against the Petitioner if the jury should return a verdict in favor of the Plaintiff and against Respondent. After the trial which ended April 28, 1958, Respondent, on May 7, 1958, filed a motion for judgment notwithstanding the verdict or for a new trial (R. 3a) which the Court denied (R. 191a).

On the same date as the jury's verdict, to wit April 28, 1958, the trial judge entered judgment in favor of the Petitioner and against the Respondent.

It is now well settled that a Motion for judgment notwithstanding the verdict may be entertained only if the movant has made a motion for a directed verdict at the close of all of the evidence, and that a mere request for binding instructions in points for charge is not a substitute for compliance with Rule 50.

Budge Manufacturing Co. v. U. S., (CA 3rd 1960) 280 F. 2d 414;

Mutual Ben. Health & Acc. Assn. v. Thomas, 123 F. 2d 353.

See also: *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 91 L. Ed. 849.

Rule 50 requires that the Motion for a directed verdict be filed at the close of the evidence offered by an opponent and that such motion "shall state the specific grounds therefor" (Rule 50(a)). As heretofore noted, no such motion was filed at the close of Plaintiff's evidence or at the close of Petitioner's evidence, nor indeed at any time during the trial, either as to Plaintiff or Petitioner.

A Motion for judgment notwithstanding the verdict may be entertained only if the movant has duly made a motion for a directed verdict in accordance with Rule 50: *Mutual Benefit Health & Acc. Assn. v. Thomas*, 123 F. 2d 353 (CCA 8th 1941). Hence, a Defendant who fails to move for a directed verdict at the close of all the evidence cannot present to the trial court a question as to the legal sufficiency of the evidence to support a verdict for his opponent by a motion for judgment notwithstanding the verdict or raise the question on appeal: *Mooman v. Reading Co.*, (E. D. Pa. 1946) 66 F. Supp. 636, aff'd 156 F. 2d 678; *Aetna Casualty and Surety Co. v. Yeatts*, (CCA 4th 1941) 122 F. 2d 350; *Dickerson v. Franklin Nat. Ins. Co.*, (CCA 4th 1942) 130 F. 2d 35.

The reason why a Motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding a verdict is well stated by Judge Gardner in *Mutual Benefit Health & Accident Assn. v. Thomas*, (123 F. 2d 353, 855). In the interest of brevity we refer to his excellent opinion without quotation here.

Since it is clear that no motion for directed verdict pursuant to Rule 50 was ever filed by Respondent, it was error for the Court of Appeals to consider the Respondent's right to judgment n.o.v. on any ground or to direct the District Court to enter judgment for Respondent.

For purposes of appeal, a motion for a directed verdict is necessary to raise the legal question of the sufficiency of the evidence or the propriety of the jury's findings. *Budge Mfg. Co. v. U. S.*, (*supra*).

When a party allows a case to go to the jury without challenging the sufficiency of the evidence *by a motion for a directed verdict*, the appellate court is powerless to review the sufficiency of the evidence to support the verdict. *Pruett v. Marshall*, 283 F. 2d 436, 438; *Southern Railway Company v. Miller*, 285 F. 2d 202, 206; *Rotondo v. Isthmian SS Co.*, 243 F. 2d 581, 582.

Where it is a party's contention that as a matter of law he was entitled to a verdict, nothing is present for consideration of the reviewing Court in the absence of a motion for directed verdict: *Strickland v. Perry*, 244 F. 2d 24, 25; *Harnik v. Lilley*, 167 F. 2d 159; *Home Ins. Co. of N. Y. v. Davila*, 212 F. 2d 731.

The importance of Rule 50 and compliance with its precise terms is forcefully demonstrated by the decision of this Court in *Johnson v. New York, New Haven & Hartford Railroad Co.*, 344 U. S. 48, 97 L. Ed. 77, where although the party had filed a Motion for a directed verdict at the close of the evidence under Rule 50 which was denied by the trial judge, *but did not*, in his subsequent motions, expressly request *"to have judgment entered in accordance with his motion for a directed verdict"* as required by Rule 50(b),

it was held that the Court of Appeals could not enter or direct the trial court to enter a judgment nothwithstanding the verdict.

In the instant case the Respondent not having filed a motion for directed verdict as against any parties obviously could not and did not comply with the requirement that he ask to have judgment entered in accordance with his motion for a directed verdict.

It is thus obvious that so much of Respondent's argument as is predicated on the erroneous assumption that he had filed a motion for directed verdict under Rule 50(b) must be disregarded.

The entire argument of Respondent, therefore, under its second and third questions presented must be disregarded since it mistakenly assumes that it filed an appropriate motion under Rule 50 and indeed incorporates this erroneous assumption into the statement of its questions presented. The fact is that no questions had been reserved for judicial determination pursuant to Rule 50 and the district judge was not charged with any duty to rule upon any motion for directed verdict and the court of appeals had no right to order a reversal.

Respectfully submitted,

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October Term, 1961.

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Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.,
Respondents.

REPLY BRIEF FOR RESPONDENTS.

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REPLY BRIEF FOR RESPONDENTS.

At the oral argument on February 20, 1962, the Court granted the respondents leave to file a brief in reply to a procedural question which petitioner raised for the first time in a reply brief served upon respondents' counsel on Friday, February 16, 1962, three days prior to the time the case was listed for argument and four days before it was called for argument.

For the first time the petitioner raised the procedural point of whether what had been filed in the district court constituted compliance with Federal Rule of Civil Procedure 50(b). Upon the point turns the question of whether the respondents are entitled only to a new trial or whether the court of appeals was correct when it said that the judgment in favor of Atlantic and Gulf Stevedores, Inc.

> "will be reversed, and the cause remanded with directions to the district court to proceed in accordance with this opinion." [R230, concluding words of the opinion of the court of appeals.]

Respondents first call attention to the fact that the court of appeals did not enter judgment but remanded the case to the district court with directions. In no case cited or relied upon by the petitioner did the judgment of the court of appeals remand the case with directions. The court of appeals did not enter judgment. It is to be noted as well that one of the cases upon which the petitioner chiefly relies is *Budge Manufacturing Co. v. U. S.*, [C. A. 3, 1960] 280 F. 2d 414. We call attention to the fact that a three-judge panel of the court of appeals decided the *Budge* case and that two of the same three judges decided the case at bar. We respectfully suggest it is not to be presumed that two of the same three judges who heard and decided the case at bar in the court of appeals would be unmindful of the point which petitioner now raises for the first time, if in fact it was the identical point.

At oral argument we called attention to the fact that this point was not raised by petitioner until the filing of

its reply brief in this Court four days before the case was called for argument. The point had not been raised by the petitioner in the court of appeals; in its petition for rehearing in the court of appeals; in its petition for certiorari; or in its main brief for this Court. As we conceded at oral argument, a separate paper denominated "A Motion under Rule 50(b)" was not filed by respondents, and if such a separate paper is required then respondents concede the validity of the petitioner's point.

As will more fully appear by reference to excerpts from the record in the district court [not incorporated into the appendix in the court of appeals or the record before this Court for the simple reason that they were heretofore unnecessary to the points raised], counsel made a statement at the close of the evidence and addressed it to the trial court. In the original record it appears on page 1113. The last evidence from the last witness appears at page 1112 of the record.

Respondents' counsel said:

"Judge Ganey, I made a motion at the end of the plaintiff's case, and I have handed in a written motion for binding instructions. I renew the request, but I am also twenty-one-plus; I know that with the attitude of the Court of Appeals I am wasting my breath.

THE COURT: That is quite all right. Let the record show it is denied.

MR. MARSHALL: So the record will be clear, the motion I referred to a while ago was my motion for directed verdict. It was inadvertently attached to my original motion under 41(b).

THE COURT: Yes, that is all right. That is on the record and it is so denied.

MR. BOROWSKY: While we are talking about the record, may I also add that I have requested a directed verdict on the ground of unseaworthiness?

THE COURT: Yes; that is right. Motion denied. What do you want to do? Do you want to take them up? I would like to hear all of you. Shall we wait till after luncheon? What do you want to do?

MR. BYRNE: Take up the requests for charge, Judge Ganey.

THE COURT: Points for charge? I would like you to get together. I don't mean points for charge—I mean interrogatories to the jury. They are pointed toward, it seems to me, and look toward each particular——"

Respondents' written requests for charge so far as they are here material read as follows:

"3. If you should return a verdict in favor of the plaintiff and against the defendants, or either of them, then under all the evidence you must return a verdict in favor of the defendants and against the third party defendant, Atlantic & Gulf Stevedores, Inc.

* * *

7. If, on the other hand, you find in favor of the plaintiff and against the defendant, and the basis of your finding is that the method of discharging was not reasonably safe and proper under the circumstances existing at the time of the accident, then I charge you that under these circumstances you must further find a verdict in favor of the defendant and against Atlantic & Gulf Stevedores, Inc."

When the third circuit decided *Budge, etc., supra,* it said:

"It is difficult for us to perceive how this requested charge[1] made *before any evidence had been*

---

[1] "Under the law and the evidence in this case your verdict must be for the plaintiff".

> *tendered* in the case, not renewed at the conclusion of the government's case, and whose specific denial by the court was acceded to or at least not objected to by the taxpayer, can be construed as fulfilling the requirement of Rule 50(a)."

Here there was no written request for charge filed before any evidence had been tendered nor was it a request "thrown in along with a considerable list of points".

Counsel for respondents filed its brief on post-trial motions in which it stated, inter alia, "Ellerman made a motion to dismiss at the close of the plaintiff's evidence and submitted its points for binding instructions. It thus reserved its right, pursuant to Rule 50(b)".

Ellerman then proceeded to argue its post-trial motions and one of the points it made was

> ". . . that, as a matter of law, the defendant [respondent] is entitled to judgment for indemnity against Atlantic [petitioner]."

Basing their subsequent argument upon decisions of this Court, chiefly *Crumady v. The Joachim H. Fisser*, 358 U. S. 423, the respondents then argued this question to the district judge. Petitioner likewise argued this same question to the district judge and never suggested that there had been any procedural lapse or that the question was not open for decision because of any deficiency in preserving respondents' right to argue because respondents had not complied with Rule 50(b).

The same is true of the case as it proceeded through the court of appeals and upon petition for certiorari before this Court.

It is submitted that the oral motion by respondents' counsel quoted above combined with the written request that the jury must "find the verdict in favor of the defendant and against Atlantic and Gulf Stevedores, Inc." [R157a] constituted compliance with Rule 50 and that the filing by the respondents on May 7, 1958 [R3a] of "de-

fendants' motion for judgment notwithstanding the verdict, etc." was compliance with Rule 50(b). Neither petitioner nor the court below was in any doubt about reasons or the specific grounds of respondents' motion, for at page 1140 of the original record [not reproduced for the reasons heretofore stated] respondents' counsel said:

> "If the defendant is liable on that basis I think that is the clearest kind of case for an award of indemnity over."

It is respectfully suggested that if petitioner is serious in the arguments it has made in its reply brief, it has misread this Court's decision in *Johnson v. New York N. H. & H. R. Co.*, 344 U. S. 48. There the defendant did not file a post-trial motion for judgment notwithstanding the verdict although, "when the evidence was all in, the railroad moved to dismiss the complaint and also asked for a directed verdict in its favor, etc." After reception of the verdict, the railroad defendant in that case

A. moved to have the verdict set aside as excessive;

B. moved to have the verdict set aside as contrary to the law;

C. moved to have the verdict set aside as contrary to the evidence;

D. moved to have the verdict set aside as contrary to the weight of the evidence.

It is to be specifically noted that the post-trial motions of defendant there did not exclude a prayer for the entry of judgment n.o.v.

We respectfully urge that the petitioner relies upon pure semantics.

We emphasize that we are not relying upon any state practice or any state statute with respect to the entry of judgment notwithstanding the verdict. Cf. 344 U. S. at 52, footnote 2. What we are urging is that the use of colloquial

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Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.,
Respondents.

PETITION FOR REHEARING.

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phraseology asking for the entry of judgment notwithstanding the verdict should not be a bar to the entry of such judgment because certain magic words had not been used, again probably because they are not in accordance with the colloquial phraseology with which the Court and all counsel involved are abundantly familiar.

Here the district court did have presented to it the questions of whether it would enter judgment notwithstanding the verdict or would grant a new trial. The fact that it rejected both does not detract from the opportunity presented to it to "exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by the witnesses". *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212 at 216.

The district court had the opportunity to determine

> "whether a new trial should be granted or a judgment entered under Rule 50(b) . . ." *Cone, supra.*

The district court had the opportunity

> "after all his rulings had been made and all the evidence had been evaluated to view the proceedings in a prospective peculiarly available to him alone." *Cone, supra.*

It is respectfully submitted that the motions, requests for charge and post-trial motions in the case at bar fully preserved the rights of the respondents without the filing of a separate sheet of paper called a motion under Rule 50. It is respectfully submitted that the court of appeals was fully cognizant of the prior decisions of this Court and its own prior decisions [*Budge v. U. S., supra*] when it reversed and remanded this case with directions to the district court to proceed in accordance with its opinion [R230].

The respondents suggest that the matter raised for the first time in petitioner's reply brief filed just before oral

argument is not only without merit but that the point raised is merely an effort to distract the attention of the Court from the main issues in the case and the lack of merit of petitioner's attack upon the decision of the court of appeals as to the real issues between petitioner and respondents.

Respectfully submitted,

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ANSWER TO REPLY BRIEF FOR RESPONDENTS.

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ANSWER TO REPLY BRIEF FOR RESPONDENTS.

This Honorable Court granted leave to respondents in the above captioned matter to file a simple memorandum of cases sustaining the point which its counsel made at argument, namely, that in the United States District Court for the Eastern District of Pennsylvania it is common practice not to file a motion for directed verdict pursuant to Rule 50 and that instead the courts of that District require no more than compliance with the State practice of filing only a point for binding instructions. In their Reply Brief, respondents cite no such cases or authorities. Indeed, there are none to support the contention of the respondents.

The colloquy referred to in the Reply Brief (p. 1113 original notes) clearly demonstrates that there was no compliance with Rule 50 orally or in writing, and that respondents were simply renewing their prior motion for binding instructions in the action between plaintiff and respondents, and were not then making any motion in the third party action as against the petitioner. Their failure to make any motion under Rule 50, with reasons as required, at the close of the case against petitioner, precludes any reversal of the judgment or any direction to reverse such judgment, in the case between respondents and petitioner. The cases supporting this point are fully briefed in Petitioner's Reply Brief. It will be recalled that respondents asserted at the argument, in response to a question, that the effect of the lower court's ruling was to enter judgment. Since the original Brief for Respondents predicated its second and third questions presented directly upon the deliberate but now admittedly erroneous statement, that respondents had filed a motion for directed verdict under Rule 50, it was obviously incumbent upon petitioner to point out this error in its Reply Brief to maintain the integrity of the facts in aid of this Court and not as respondents cynically suggest "to distract the attention of the Court from the main issues in the case . . ."

The plain fact is that *in this very case*, as the docket entries (R. 3a) and record (R. 186a) reflect, both the plaintiff and petitioner filed with the court, and served upon respondents, motions for a directed verdict in strict accordance with Rule 50. Respondents were thus fully aware of the necessity for such motion but never did more at the trial than request binding instructions by way of a point for charge, as to the petitioner.

Respectfully submitted,

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PETITION FOR REHEARING.

On April 2, 1962, this Court announced its Decision, two Justices dissenting,[1] and reversed the Judgment of the Court of Appeals for the Third Circuit. This Decision, in turn, had reversed a Judgment of the United States District Court for the Eastern District of Pennsylvania which had been entered upon the verdict of the jury. The Court of Appeals remanded the case with directions.

While the Court of Appeals had reversed the Judgment of the District Court as a matter of law, it had made other points, finding other error in the Charge which, if its reversal and direction was wrong [as this Court has now held] nevertheless entitled this Respondent to a new trial.

This Petition for rehearing will address itself to two questions.

A. The Judgment of this Court reversing the Court of Appeals should be modified to provide for a new trial as between Petitioner and Respondent.

B. Certain language in the last paragraph of the Court's Opinion which apparently extends a shipowner's warranty of seaworthiness to the packaging around cargo which it carries as a common carrier should be modified. The issue of unseaworthiness was not before this Court in this case and if there is to be such an extension of the "awesome"[2] responsibility for unseaworthiness, it is respectfully suggested that it should only be done after full consideration and in a

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1. Justices Stewart and Frankfurter—Mr. Justice Whittaker had retired March 30, 1962. Mr. Justice White had not yet been appointed.

2. *Kent v. Shell Oil Co.*, 286 F. 2d 746, 752 (C. A. 5, 1961); *Waterman Steamship Corp. v. Gutierrez*, — F. 2d — (C. A. 1, April 11, 1962), not yet reported.

case where that is the issue and the pros and cons have been submitted for decision.

A. Accepting for the purposes of this Petition all that the Court's Opinion of April 2, 1962 considered and held, we respectfully suggest that the Judgment of this Court should not be a mere reversal. Reversal should be with directions that a new trial be had between Respondent and Petitioner.

We say this because the Court of Appeals considered more points than the Opinion of this Court has discussed. The Court of Appeals, perhaps considering the possibility of reversal, held squarely and specifically (289 F. 2d at 208) that the following instruction by the Trial Judge to the jury was error and that exceptions to it had been taken.

> "If you find that Atlantic & Gulf Stevedores, Mr. Marshall's client, was unloading the bales in a proper and safe manner, *using a method that was in accordance with the practice, customs, and usage in the Port of Philadelphia,* and that that was not in violation of their breach of contract which obtained between them, *then your verdict must be in favor of the Atlantic & Gulf Stevedores.*" (Emphasis supplied by the Court of Appeals.)

If the Court of Appeals was correct and that portion of the Charge to the jury was wrong, then a new trial is required and this Court's mandate should so direct.

It should be noted that in the above quoted language from the Charge [R. 185a-186a] the mandatory "must" was used. As this Court points out in Footnote 4 to its Decision in this case (Slip Opinion pages 8 and 9) dealing with another request, this time by the shipowner, this was a direction to the jury that if it found Petitioner's work method was in accordance with the custom and usage, it was not liable as a *matter of law.* Such a direction to the jury withdrew from jury consideration the question of whether

the stevedore performed its contract obligation "with reasonable safety" and rendered "workmanlike service."[3]

This Court cannot speculate that the jury ignored this erroneous instruction by the trial judge, for when more than one theory is submitted to the jury, on either of which they might have based decision and one of the instructions was erroneous, the verdict cannot be upheld.

> "If therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given." *State of Maryland v. Baldwin*, 112 U. S. 490.

This is fundamental law which has been universally followed.

"Practice, custom and usage" are admissible in evidence but they do not form the standard upon which a jury must base its finding. If the petitioner's work method did not measure up to the jury's standard of "reasonable safety" and "workmanlike service", it should have been left free to so determine for "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence".[4]

> "The tanker industry cannot hoist itself by its own bootstraps through the device of setting up standards of conduct amounting to something less than reasonable care under all the circumstances and then predicate defense on such sub-standards". *Petition of Oscar Tiedemann Co.*, 179 F. Supp. 227 at 238, 239.

> "What has been done by others previously, however uniform in mode it may be shown to have been, does

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3. *Waterman Steamship Corp. v. Dugan & McNamara*, 364 U. S. 421; *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423.

4. Holmes, J. in *Texas and P. Ry. Co. v. Behymer*, 189 U. S. 468.

not make a rule of conduct by which the jury are to be limited and governed . . ." *State, to use v. Clark*, 41 Del. 246, 20 A. 2d 127, 130.

The Court of Appeals in its Opinion in this case had discussed the "custom" question at some length earlier in its Opinion, 289 F. 2d at 205-206, and concluded that the jury should have been left free to find whether the "customary method" did or did not satisfy the standard of reasonable care.

If the shipowner's right to indemnity was not a matter of law, then by the same standard neither was the stevedore's work method and if one was properly for jury determination then, we submit, so was the other. A new trial with proper jury instruction is required.

B. The last paragraph of this Court's Opinion begins with the following sentence:

> "So far as we know the jury may have found respondents liable not on either of those two grounds but solely on a third, namely because of defective bands—a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so. Weyerhaeuser S. S. Co. v. Nacirema Co., 355 U. S. 563, 567."

This Court's decision in *Weyerhaeuser S. S. Co. v. Nacirema Co.* did not deal with the question of whether the shipowner, in addition to warranting seaworthiness of its vessel and its appliances, and the appliances which the stevedore brings on board for use in the loading or discharging operation,[5] also warrants that the cargo which the common carrier has transported by water shall be "cargo safe to handle".[6]

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5. *Alaska S. S. Corp. v. Petterson*, 347 U. S. 396.

6. *Carabelleas v. Navieras Asmar S. A.*, 285 F. 2d 355 (C. A. 2, 1960), cert. denied, 365 U. S. 872.

In view of the jury's answers to interrogatories, finding respondent liable for *both unseaworthiness and negligence,* it is difficult to see how this Court, interpreting the jury finding, can make any statement inferring that unseaworthiness could have been the *sole* ground for the jury's determination. To do so is for this Court to do precisely what it held improper when done by the Court of Appeals.

The Court of Appeals said that it was

> "Unnecessary for us to consider the issue of seaworthiness which was premised on Beard's view that the doctrine of unseaworthiness extends to the packaging of the ship's cargo." 289 F. 2d at 208.

Consequently that issue was not briefed or argued here by the parties. If this Court's language means what it seems to say, it has extended liability without fault into an entirely new and greatly broadened sphere without reference to, and indeed in contravention of, the policies which apparently motivated this Court in promulgating liability for unseaworthiness in the first place. *Seas Shipping Co. v. Sieracki,* 328 U. S. 85.[7]

At least three Courts of Appeal have refused to extend the carrier's warranty to the cargo it transports.

> "But we know of no case that imposed absolute liability on the owner where the alleged danger was inherent in the cargo and this was still in the course of being loaded. Hence the question posed is whether the owner warrants to longshoremen not simply a safe place in which to handle cargo, but cargo which is safe to handle. We are not disposed so to extend the doctrine, at least on the facts here. Almost any cargo presents

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7. The stevedore "ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them". *Seas Shipping Co. v. Sieracki,* 328 U. S. 85 at 95.

some hazard in handling." *Carabellese v. Naviera Azsor S. A.*, 285 F. 2d 355, 359, 360 (C. A. 2, 1960) cert. denied, 365 U. S. 872.

The Court of Appeals for the Third Circuit apparently concurs with the Second Circuit's Decision in *Carabellese*. See Footnote 9 to its Opinion in this case, 289 F. 2d 208 [R. 229, 230].

When liability for unseaworthiness of cargo was asserted as the ground to support recovery, the Court of Appeals for the First Circuit declined to approve and said:

"But it seems to us that to extend such protection disregards the whole origin and purpose of the doctrine of unseaworthiness" and by Footnote at that point commented:

"Singularly enough, the doctrine of absolute tort liability for injuries ashore, to the extent that there have been cases, seems to exist solely for the benefit of longshoremen. Whether these decisions represent the independent views of the courts concerned, or are merely thought to be required by those of the Supreme Court, may be problematical. Cf. Robillard v. A. L. Burbank & Co., 186 F. Supp. 196. But we know that on at least one occasion we ourselves have erroneously exaggerated those views. New N. H. & H. R. R. v. Monagan, 1 Cir., 1959; 272 F. 2d 153, rev'd, 1960, 364 U. S. 441."

Waterman Steamship Corp. v. Gutierrez, — F. 2d —; (C. A. 1, April 11, 1962, Slip Opinion, page 4).

As the Court of Appeals for the Fifth Circuit has said:

"Unseaworthiness to be sure sets in train awesome obligations which distinguish it from negligence." *Kent v. Shell Oil*, 286 F. 2d 746 at 752 (C. A. 5, 1961).

Where this question was presented to this Court, it denied certiorari, *Beard v. Ellerman Lines, Ltd.*, No. 284, this

term. It is respectfully suggested that judicial restraint should preclude this Court from extending the field of absolute liability by indirection in a case where the issue is not before it. This is particularly so where, as here, the cargo has been the subject of common carriage.[8]

Extension of absolute liability based upon unseaworthiness should not, we suggest, be determined without at least a full scale presentation of the issues and consequences.

Recently the Federal Maritime Board held that explosives were the subject matter of common carriage.[9] Such holdings by the body charged with the function of regulating ocean shipping are in basic conflict with the concepts of "warranty of cargo safe to handle". If fitness for its intended purpose is the test, does such a carrier warrant that dynamite will or will not explode?

It is respectfully urged that this Honorable Court shall modify the language in the last paragraph of its Opinion in this case and withhold determination of a question of far-reaching importance until that case is actually presented for determination. It is respectfully suggested that, in addition to other questions which will then require decision, this Court may then have to consider whether Constitutional issues may not be raised by judicial decisions which require a carrier to "warrant" while, at the same time, the regulatory agency and Congressional enactment require him to carry. Whether such amount to unconstitutional deprivation of property and unequal protection as between water

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8. A common carrier "is, in general, bound to take the goods of all who offer, unless his complement for the trip is full . . ." *The Niagara v. Cordes*, 62 U. S. 7.

"To constitute common carriage the carrier must be under such a legal obligation to carry that an action will lie against him for a refusal to perform . . ." Hutchinson on Carriers, 3rd Ed., Section 62.

9. Absorption or Equalization of Inland Freight Charges, F. M. B., Docket No. 819, decided December 16, 1960, not yet reported. But Cf. *Parrott v. Wells*, 15 Wall. 524; *California Powder Works v. Atlantic & Pacific R. Co.*, 113 Cal. 329; and cases there cited.

and other carriers are questions which, we submit, require more than offhand treatment.

Wherefore, it is respectfully submitted that this Honorable Court shall modify its Judgment to require a new trial of the issues between Respondent and Petitioner under proper instructions so that both sides shall have jury determination, and that reference to liability for unseaworthiness of cargo required to be carried shall await decision until that issue is fully and clearly presented.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that the within petition for rehearing is filed in good faith and not for the purpose of delay.

THOMAS E. BYRNE, JR.